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Workers' Compensation Appeals Tribunal

INTERIM DECISION NO. 70

Tribunal d'appel des accidents du travail

Panel Chairman: L Bradbury

Member: R. Higson

Member: R. Apsey



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 70

THE APPEAL PROCEDURE:

This is a worker appeal of the November 9, 1984, decision of the Workers' Compensation Board Appeals Adjudicator, Mr. J.M. Davies, which denied the worker entitlement to compensation for his low back disability.

The appeal was heard on February 12, 1986, by a Panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, R. Higson, a part time member of the Tribunal representative of workers, and R. Apsey, a member of the Tribunal representative of employers.

The worker was represented by Mr. J. Martin, Chairman of the Workers' Compensation Committee of the worker's local union. The employer was represented by Mr. J. Kupecki, employee relations assistant. L. Gehrke, appeared on behalf of the Tribunal's Counsel Office.

The Panel heard and considered evidence under oath of the worker. It also heard evidence under oath of three other witnesses who were summoned by the Tribunal's Counsel Office--1 co-worker of the appellant and 2 foremen from his work place.

The Panel read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description materials. These materials were distributed to the parties prior to the hearing and were approved by them at the Hearing. The materials were marked as Exhibit "1".

Submissions were made by the worker's representative, the employer's representative and by the Tribunal's Counsel.

THE ISSUE AND HOW IT ARISES:

The worker is a steelworker. He worked for the employer for 16 years without incident. In 1983, the worker's permanent posting was as a "mag marker" in the number one conditioning area of the plant. This job consisted of checking steel billets, which weighed between 600 and 1,600 pounds, as they passed along a roller line. The "mag marker" is responsible for marking any defects on the steel. If any bent billets appear on the line, the line jams. It is the responsibility of the mag marker to either turn the steel billets manually or re-set the billets on the line manually if the line jams. This operation was demonstrated by the worker. He was required to bend at the waist, reach across the line and use a prybar or crowbar to move the billets. If the whole operation is working properly, no bent steel should appear on the mag marker's line--bent steel should be straightened in an earlier part of the operation called the "gagger". However, the worker and all the witnesses testified, that bent steel often appeared on the mag marker's line, anywhere from 2 or 3 times per shift to 2 or 3 times per week.

The worker's evidence was that on May 7, 1983, he worked the night shift. He recalled an exceptionally heavy run of bent steel which required a lot of exertion and heavy manual labour on his part. The worker stated that he noticed a "tiny pain" in his back following this heavy work. However, he did not report the pain to his employer and he continued working at his regular job.

On July 22, 1983, the worker visited his family doctor, Dr. F. Martyniuk, complaining of pain in his back, left hip and left leg. The worker apparently told his doctor he had experienced the pain for about 2 months, but did not relate the pain to a specific incident at work. X-rays were taken and indicated a muscle spasm in the worker's back.

Dr. Martyniuk referred the worker to Dr. B.W. Shragge, a cardiovascular surgeon. Dr. Shragge saw the worker in September, 1983, and ordered some tests. The doctor concluded that there was no vascular problem.

Meanwhile, the worker continued to work. In September, 1983, conditions at the plant were unsettled due to economic conditions and a number of workers were laid off. The worker was a junior mag marker and was "bumped" into the heavier job of "gagger" on September 17, 1983. In this job, the worker was required to straighten bent steel billets before they went to the mag marker section. The billets have to be turned constantly during the shift. Both the foremen who appeared as witnesses testified that this was a heavier job than that of mag marker.

It was after this job change that the worker began to limp. All the witnesses testified that they noticed the worker limping. The foremen testified that they questioned the worker and asked him if anything was wrong. Again, the worker did not relate an accident or a specific incident. The worker's testimony at the hearing was that he told the foremen words to the effect of, "You know the work I do".

At the hearing, the worker testified that if he had not switched jobs, he would never have lost time from work, but because of the heavier work as a gagger, his back worsened.

On November 22, 1983, the worker was scheduled to see Dr. Shragge. He appeared for the appointment in pain and limping. Dr. Shragge sent the worker to the emergency department of the hospital on November 23, 1983. At the hospital, Dr. T. Brox examined the worker. Again, the doctor noted that no history of traumatic injury or accident was related by the worker. The doctor stated in his report that:

"The history of this is fairly vague in the sense that the patient cannot date this back to one particular day. He has been having increasingly severe bouts of left leg pain associated with activity that are relieved by rest."

Dr. Brox noted a very tender lower back and a very decreased range of motion, flexion, extension and lateral bending.

The worker was unable to return to work due to the pain in his back and leg. He saw Dr. Lofthouse, an orthopaedic surgeon, on November 23, 1983, at Dr. Shragge's request. Dr. Lofthouse reported a history of "left-sided leg pain which had come on over a period of several weeks. There was no particular incident that he was able to recall but he stated that he does do a heavy job."

Subsequently, Dr. Lofthouse diagnosed a disc protrusion at the L4-5 level and found the worker had only 45 degrees of straight leg raising on the left. Dr. Lofthouse, in a report dated February 3, 1984, to Dr. Martyniuk wrote, "(the worker) is concerned about how this came about and thinks it is due to his work and I have tried to inform him that it is not likely a compensation case unless there was a specific episode." Dr. Lofthouse noted that the worker was not fit to return to heavy work and that it would be many weeks before he could contemplate working.

The worker testified that he did not engage in any strenuous activity outside his employment.

The worker returned to work on October 28, 1984. He was given a job as mag marker in number 3 conditioning. The worker's evidence, which was supported by the foremen, is that this job is easier than his previous job of mag marker in number 1 conditioning. The reason is that, when the steel jams, a millwright is called to correct the jam; the operator is not required to correct the problem, as in number 1 conditioning.

The worker testified that he has not lost any time from work due to his low back problem since his return to work.

The worker did not contact the WCB until February 27, 1984, when his Union reported to WCB by letter that the worker suffered a back injury at work on May 7, 1983.

The Appeals Adjudicator denied entitlement on the basis that there was no evidence of an industrial accident arising out of and in the course of the worker's employment on May 7, 1983. In denying entitlement, the Adjudicator noted the delay in reporting to the employer, the lack of continuity of complaint and the delay in seeking medical attention, as well as lack of confirmation by co-workers or supervisors.

The worker's representative argued that there was a precipitating incident on May 7, 1983, which initiated the worker's back pain. The back pain became worse when the worker was transferred to the "gagger" job in September, 1983, to the point where the worker was unable to work after November 23, 1983.

The employer's representative argued that the only issue before the Panel was whether there was an accident arising out of and in the course of the worker's job. The representative submitted that it would be improper for the Panel to consider the issue of disablement, since the Appeals Adjudicator did not deal with that issue. Therefore, he submitted that the Panel had no jurisdiction to deal with the issue of disablement.

The issue for this Panel is whether the worker is entitled to compensation for his low back disability during the time he was off work from November 23, 1983, until October 27, 1984. The applicable section of the Workers' Compensation Act then in effect is Section 3(1) which states:

s.3(1) Where in any employment, to which this Part applies, personal injury by accident arising out of and in the course of the employment is caused to a worker, his employer is liable to provide or to pay compensation in the manner and to the extent hereinafter mentioned, ...

That Section refers to injury by accident. Accident is defined in Section 1(1)(a) of the Act as follows:

S.1(1)(a) "Accident" includes:

- (i) a wilful and intentional act, not being the act of the worker,
- (ii) a chance event occasioned by a physical or natural cause, and
- (iii) disablement arising out of and in the course of employment;

The Panel finds there are a number of ways under the Act for an injury by accident to occur, including disablement. Therefore, this Panel is of the view that it has jurisdiction to consider evidence of a traumatic incident, a chance event, or disablement, any one of which may be an "injury by accident" within the Act.

THE PANEL'S REASONING:

This is a case where it appears from the evidence that the worker experienced a gradual onset of pain and disability over a number of months. The worker had a heavy job and testified that he always felt some pain; however, in May, 1983, he noticed an extra "tiny" pain in his back following a run of bent steel billets requiring increased exertion on his part. This worker is a man who is 6' 2" and weighed 235 pounds at the time in question. He appeared to the Panel as an honest, straightforward man who had always done his job without complaint. Even after he experienced the pain in his back, he continued working at his regular job without complaining to anyone.

The worker saw his family doctor in July, 1983, and complained of back pains which he told the doctor had existed for the past two months. However, it was not until the worker was transferred to the heavier job of "gagger" in September, 1983, that the pain increased to the point where he was limping and having trouble doing his work.

After the worker changed to the heavier job he saw a number of doctors but did not relate his back pain to a specific incident at work. The Panel accepts the worker's statement that he told doctors he had a heavy job and this is confirmed by Dr. Lofthouse's reports. It appears that there was no specific accident or incident at work on May 7, 1983, or at any time.

The worker testified that he did not engage in strenuous activity outside his work and there is no evidence before the Panel suggesting any cause other than the workplace.

In injury cases before WCB, the main focus is disability caused by trauma. In these cases, a specific incident is required in order for an injury to be compensable. But, the absence of a specific incident is not a bar to entitlement in and of itself. If an injury occurs over time, and there is something about the employment that causes the injury, the injury is compensable.

The WCB has a policy on disablement which is set out in Directive 2. That policy requires that there must be something about the work which can be considered to have caused the disablement to come on, such as strenuous work, awkward position, unaccustomed strain, or even a movement arising out of the work which it is reasonable to consider has caused the disablement.

The evidence before the Panel is that the work required of the worker was strenuous and that, in May, 1983, and again after the job change in September, 1983, the work was even more strenuous than usual. Thus, it appears that the requirements of the Board's policy on injury by disablement have been met. Why then, was the claim denied?

It appears to the Panel that there are two reasons why the worker's claim was denied. The first is that, initially, the worker's Union incorrectly identified a specific accident on May 7, 1983, rather than suggesting injury by disablement. We say "incorrectly" because the worker's evidence has remained consistent throughout. He recalls May 7 as a date when there was a particularly heavy run of bent steel, following which he noticed pain in his back. The worker has never identified a traumatic accident or incident occurring on that date.

The second reason for a denial appears to be that the WCB also focused on a specific accident, although the evidence indicates injury by disablement occurring over time.

This Panel accepts the worker's evidence of the work he was doing between May, 1983, and November, 1983. His evidence is supported by that of the witnesses who testified at the hearing.

The Panel accepts further that the worker sought medical attention for his back pain which resulted from the unusually strenuous work. The Panel finds that the worker's failure to relate a specific incident to his foremen or to his doctors is in accordance with the type of injury he suffered and is not a reason to deny his claim.

The Panel is satisfied that the evidence indicates that the worker suffered an injury by disablement which occurred during the period from May, 1983, to November, 1983 and which arose out of the work he performed for his employer.

DECISION:

The appeal is allowed. The worker is entitled to temporary compensation benefits for the period from November 23, 1983, to October 27, 1984. The Panel leaves to the WCB the calculation of the amount in question.

DATED at Toronto this 25th day of March, 1986.

SIGNED: L. Bradbury, R. Higson, R. Apsey

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Workers' Compensation Appeals Tribunal

DECISION NO. 73

Tribunal d'appel des accidents du travail

Panel Chairman: R.E. Hartman

Member: F. Lankin

Member: R. Apsey



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

May 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 73

THE APPEAL PROCEDURE

The worker appeals a decision of W.P. Ireland, Appeals Adjudicator, dated July 17, 1984, which denied her claim for entitlement for permanent organic disability and further entitlement for psychiatric disability arising out of an accident on October 3, 1979.

The appeal was heard on the 17th day of February, 1986, by a Panel of the Appeals Tribunal consisting of R.E. Hartman, Panel Chairman, F. Lankin, a member of the Tribunal representative of workers, and R. Apsey, a member of the Tribunal representative of employers.

The worker appeared and was represented by H. Katz, Counsel. The employer was represented by its General Manager, A. Meskauskas. The worker, the employer's General Manager, and a friend of the worker, Ms. S., gave sworn testimony before the Panel. The worker's testimony was translated by A. DeNunes, a Portuguese interpreter.

The Panel read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials. Both the worker's representative and the employer's representative had an opportunity to see the Case Description prior to the hearing and to make submissions on it. These materials were entered as Exhibit "1".

A letter from the worker's family doctor, Dr. Tjeng, dated February 4, 1986, was presented in evidence at the hearing. The employer's representative had not had an opportunity to review the letter prior to the hearing, but after doing so at the hearing, he stated he was prepared to proceed. The letter was entered as Exhibit "2".

The Panel received oral submissions at the hearing from the worker's counsel, the employer's representative, and the Tribunal's Counsel, D. Munro.

THE ISSUES AND HOW THEY ARISE

At the time of the compensable injury, the worker was 29 years of age and had been employed with the accident employer for approximately 1 year.

On October 3, 1979, the worker was employed as a general labourer. Her job was to thread metal parts onto a hanger bar as part of a chroming process. The hanger bars were placed on a rack behind the worker and on this date, one bar, apparently improperly placed, slid off and struck the worker on the lower left back.

The worker was seen by her family doctor, Dr. Tjeng, on the day of the injury and he diagnosed a soft tissue injury and tenderness from the left shoulder down to the lumbar region of the lower left back. He prescribed analgesics. X-rays taken at the time showed no abnormality in the paraspinal soft tissues.

The worker laid off work on October 3, 1979, and has not returned to her pre-accident employment since that time. An attempt to return to work was made on or about May 12, 1980. This attempt lasted a couple of hours according to the worker and about 10 minutes according to the employer.

The worker received temporary total benefits, pursuant to Section 39 of the Act from October 3, 1979, to May 14, 1981. The WCB was of the opinion that the organic disability had been resolved as of May 14, 1981 and, in recognition of an ongoing psychiatric disability, the WCB awarded the worker a 10% permanent disability award, pursuant to Sections 43 and 71(3) of the Act. In accordance with WCB policy with respect to psychiatric assessments and awards, the worker's disability was considered "minor" and, therefore, to be assessed at 10% for a two year period.

During the period that the worker was in receipt of temporary total benefits, she was seen about a dozen times by her family doctor. As early as December 11, 1979, Dr. Tjeng asked the Board to look into psychological components. On December 5, 1980, he suggested that the worker be referred to a Portuguese speaking psychiatrist. At all times, the doctor reported tenderness around the spine. The last report made by Dr. Tjeng in the period when the worker received benefits was February 26, 1981, in which he noted that she was improving slightly and had been seen by Dr. Iachelli, a psychiatrist. No report or any other reference to Dr. Iachelli is apparent in the material before us.

For the period for which the worker is now seeking entitlement, that from May 14, 1981, to the present, the worker was apparently not under the care of Dr. Tjeng who only took her case over again in January 17, 1985. The letter submitted to the Panel dated February 4, 1986, written by Dr. Tjeng, gives a completely erroneous description of the accident and gives his opinion that the worker's "situation does not look psychological and I did not send her to see a psychiatrist".

Shortly after her accident, the worker was seen by Dr. Jeremias, orthopaedic surgeon. In his report to her family doctor dated November 26, 1979, he noted that there was a full range of motion of her back and some tenderness of the lumbosacral area. Clinically, he noted that her symptoms were related to a contusion of her back and a lumbodorsal strain. He recommended X-rays and noted that there was an "element of protection as well which is perpetuating her problem". The record shows no further reports from Dr. Jeremias until March 14, 1980; however, it is noted in reports of Dr. Tjeng that in January of 1980, the worker was placed in a full body cast and hospitalized at the direction of Dr. Jeremias. Dr. Tjeng noted that the worker's complaint of symptoms continued during the period in which the full body cast was in place. On May 6, 1980, Dr. Jeremias recommended that the worker return to modified work on May 12, 1980. As noted above, the worker did attempt to return on this date.

At the request of her family doctor, Dr. Tjeng, the worker was admitted to the Downsview Rehabilitation Centre for two periods: July 3 to July 8, 1980 and July 22 to August 14, 1980. On her first discharge from the Centre, it was recommended that she be admitted to the Psychological Social Evaluation Module ("PSEM"), given the worker's marked overreaction and depression.

On her second admission to the Centre as part of the PSEM, she was seen by a number of disciplines. She was examined by a psychologist, Dr. Yarrow, on July 28, 1980, who suggested an early return to work. He noted a reactive depression superimposed on an hysterical personality which "may be partly attributable to work related accident and sequelae". However, he expressed some doubt that the symptoms were truly disabling and said it was possible for a conversion reaction to develop if an early return to work was not accomplished. On August 7, 1980, she was seen by Dr. Jones, psychiatrist, who was of the opinion that her complaints appeared to have a "significant psychophysiological component". The worker was also seen by Dr. Zeldin, an orthopaedic specialist with the PSEM, who found no evidence of disc or nerve root involvement. He noted that the response during examination "seems most exaggerated with some inappropriate and bizarre reactions to examination". During her stay in PSEM, her co-operation and motivation in the occupational therapy portion was considered to be "poor with considerable exaggeration".

On August 14, 1980, the worker was discharged from the Centre with the diagnosis that her cervical and lumbosacral strain had been fully resolved and that she was suffering from anxiety and depression and a psychophysiological reaction which was in part a response to the accident. It was recommended that the worker be treated with Diazepam, and be monitored by her family doctor. No rehabilitation was thought required at the time. She was to be reassessed in 2 months by Dr. Yarrow. (In fact, she was not reassessed until about 8 months later.)

In the fall of 1980, the worker travelled to Portugal for several weeks and on her return, was referred by her family doctor to a pain clinic where she was treated by Dr. Woo.

A report of a WCB Social Worker on November 27, 1980, noted that the worker had been interviewed at her home and was no longer on medication and showed no signs of anxiety and depression.

On April 30, 1981, the worker was examined by Dr. Peyrolon of PSEM. He diagnosed "conversion hysteria with no more than a mild psychiatric disability". He was of the opinion that her condition was related more to the treatment she received, i.e. the body cast and the compensation issue, rather than the accident. He added that her age, sex, marital status and the fact that she had a lot of work at home were all factors. He stated that the worker had developed secondary gains and "if the status quo were to be maintained, she would be a neurotic cripple at the age of 30 and for the rest of her life". As a result of this re-examination, PSEM recommended that the worker's file be closed with a 10% permanent disability award for two years. This was accepted by WCB and it was paid in a lump sum in 1981.

From 1981 to the present, the record indicates a marked drop in medical attention sought. The worker was seen by the orthopaedic specialist, Dr. Jeremias, once in 1981 and in 1982, twice in 1983, once in 1984, and once in 1985. In 1981, Dr. Jeremias noted that the worker had reached clinically "a certain plateau of recovery" although she continued to complain of symptoms. Throughout this period Dr. Jeremias noted the symptoms reported to him and gave his opinion that she was suitable for some modified work. In his last report of May 14, 1985, he noted that "X-rays of her back really look quite surprisingly good for a lady who has had trouble for about 5 years". He added that he really didn't have any treatment recommendations for her.

During the period from 1981 to the present, the worker was also seen by a chiropractor for some time in the Spring of 1983 and by a general practitioner, Dr. Munn, for a brief period in the summer of 1983.

On May 30, 1984, at the request of the Appeals Adjudicator the worker was examined at the WCB Offices by Dr. Young. The purpose was to examine for a possible organic rating for permanent disability. The worker was assisted by a Portuguese interpreter during the examination. After his physical examination of the worker, it was Dr. Young's opinion that her problem was "totally non-organic in nature" and he "did not recommend any award on the basis of physical impairment".

The worker has not attempted to return to her pre-accident employment since 1979. However, sometime in 1981 she and her husband purchased a fish store with the apparent objective of allowing the worker to assist the husband by working as a cashier and salesperson. The testimony of the worker was that she could not stand for any period of time. The testimony of her friend was that the worker and her husband had another salesperson to do the heavier work and that the worker would attend the store sporadically, depending on how she was feeling. The friend of the worker also stated that she had observed the worker on one occasion fall to her knees because of numbness in her legs. The store was eventually sold approximately 1-2 years later. The worker said it was sold because she could not work in it regularly.

The issue before the Panel is whether, from May 14, 1981, to the present, there is any ongoing entitlement for the organic injury or for the psychiatric disability.

THE PANEL'S REASONING

After reviewing the medical reports subsequent to 1981, the Panel was unable to find any evidence which was persuasive with respect to an ongoing organic disability. The orthopaedic specialist's reports on file all note the absence of any objective findings. The symptoms are reported and various treatments, such as a recommendation of a water bed, are sometimes suggested. On the information before us, the Panel can only conclude that any organic injury sustained on October 3, 1979, was resolved prior to 1981, as believed by the WCB.

The Panel notes that the accident appears to have been a very minor one in terms of physical trauma to the body. Doctors examining her throughout have remarked on the exaggerated symptomatology. It is our opinion that it is more probable than not that the worker had fully recovered physically from the injury prior to May 14, 1981.

With respect to any psychiatric disability arising out of the accident on October 3, 1979, the Panel has considered the medical evidence prior to 1981 and notes that psychological elements were noted very early on by those examining her, including her family doctor and her orthopaedic specialist. The examination at the Rehabilitation Centre confirmed the psychological component and in the report of Dr. Jones, on August 7, 1980, the psychophysiological component was considered "significant". Eight months later, on April 30, 1981, Dr. Peyrolon, was of the opinion that the worker was suffering from conversion hysteria which in his opinion was a "mild psychiatric disability". It is not clear from Dr. Peyrolon's report

whether this was a change in opinion from that expressed by Dr. Jones. The Panel can only surmise whether the difference in terminology from "significant" to "mild" is due to a difference in approach by these particular doctors, a difference in extent of examination, or a difference in the state of the worker at the relevant times.

In any event, in 1981, the worker was granted a 10% pension payable for 2 years, paid out in a lump sum. The Panel considered whether this was an adequate recognition of the disability. It referred to the Board's policies.

There was no evidence of any follow-up procedure. For Directive Number 22 made under section 71(3) (Claims Services Division Manual) to be perceived as a fair policy, its use should be as a guideline and the application of the policy should incorporate some kind of review or follow-up assessment. It was a concern to the Panel that the worker's psychiatric disability was deemed by the WCB to have been resolved two years subsequent to April of 1981, the last examination by WCB. The Panel is aware that the WCB policy provides for awards of varying percentages in the case of psychiatric disability depending on whether it is found to be minor, moderate, major, or severe. The Panel is aware of the policy set out in Directive Number 22, pursuant to section 71(3) of the Act, where the general rule is stated that the WCB considers psychotraumatic disability to be a temporary condition and that only in exceptional circumstances will this type of disability be accepted as a permanent condition. As we understand the purpose of this provision, it is to assist in rehabilitation and to protect against a psychological dependence on compensation. However, the Panel feels that while such a policy may be a good approach to take in most cases, there will be some cases which will need ongoing review to determine whether in fact the policy's intent of rehabilitation has resulted.

In this case, the Panel has no information either from an independent psychiatrist or PSEM as to the degree, if any, of the worker's non-organic disability from 1981 onward. The Panel notes that the worker is of the opinion that she has no psychiatric disability. She has introduced a letter from her family doctor to support this. The last examination by a psychiatrist, in the record before us, is that of Dr. Peyrolon of the WCB dated April 30, 1981. It is the view of the Panel that further medical evidence is required.

DECISION

The appeal by the worker for further entitlement for an organic lower back disability is disallowed.

The matter of psychiatric entitlement beyond that already awarded is referred back to the WCB for a further psychiatric assessment by the most appropriate means as determined by a WCB Surgical Consultant. The purpose of the assessment is to review the provisional award, keeping in mind the Panel's comments respecting

Directive Number 22. The Panel leaves to the WCB the determination of any further entitlement following such psychiatric assessment, without prejudice to the worker's right of further appeal should there be any dispute concerning such assessment.

DATED at Toronto this 1st day of May, 1986.

SIGNED: R.E. Hartman, F. Lankin, R. Apsey.

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Workers' Compensation Appeals Tribunal

DECISION NO. 74

Tribunal d'appel des accidents du travail

PANEL CHAIRMAN: L. BRADBURY

MEMBER: D. MASON

MEMBER: B. COOK



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 74

THE APPEAL PROCEDURE:

The worker appeals the May 6, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, Mr. F.H. Kaliciak.

The appeal was heard in Toronto on February 17, 1986, by a panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, D. Mason, a member of the Tribunal representative of employers and B. Cook, a member of the Tribunal representative of workers.

The worker appeared and was represented by Mr. J. White. The employer was notified of the hearing but chose not to attend. The Panel was assisted by Mr. G. Dee of the Tribunal's Counsel Office.

The Panel heard and considered oral evidence, given under oath, of the worker. It also read the recital of the facts contained in the Case Description Materials, prepared by the Tribunal's Counsel Office and agreed to by the worker's representative. The memoranda, reports, and transcript of the Appeals Adjudicator hearing attached to the Case Description were also considered.

Submissions were made by Mr. White and Mr. Dee.

THE ISSUE AND HOW IT ARISES:

The worker has experienced a number of problems with his left ankle. The first of these was in 1964, when, as a result of a non-compensable motor vehicle accident, he fractured his left ankle.

In January, 1979, the worker sprained his left ankle at work. The worker was able to return to his regular job after being off work for five days.

An X-ray taken at this time revealed "evidence of very gross osteoarthritic changes involving the left ankle probably the result of an old injury...". Small bone fragments in the ankle joint were also noted.

While at work on November 26, 1981, the worker stepped out of a truck, landed on a small rock and twisted his left ankle.

The WCB accepted the November 26, 1981, incident as compensable and temporary total compensation was paid, less a few days worked, until he returned to work on April 6, 1982.

Following this, the worker was able to continue working until March 21, 1984. On March 20, 1984, he was part of a crew which was repairing a portion of a road which had caved in. He had to walk on rough ground, although he cannot recall any particular twisting incident.

The next day, his left ankle was very swollen. He was off work from March 21 to June 25, 1984, and then again from July 31 to September 4, 1984. Compensation for this lost time was denied by the Appeals Adjudicator. The Adjudicator concluded that the worker's left ankle condition in 1984, diagnosed as gout, was not causally related to the 1981 occupational accident.

The issue before the Panel, then, is whether the lost time in 1984 was primarily or solely attributable to the 1964 motor vehicle accident, or to the work accidents of 1979 or 1981, or to the work activities of March 20, 1984, or to some combination of those incidents.

THE PANEL'S REASONING:

In assessing this appeal, the Panel examined the evidence pertaining to the worker's activities between the relevant dates, as well as the medical evidence.

After the car accident in 1964, the worker was placed in a cast to treat the compound fracture of his left ankle. It appears that he was off work for some three to four months as a result of this injury. The worker testified that he experienced some pain in his ankle for three to four weeks after the cast was removed, and then experienced no ankle problems until the compensable incident in 1979. A complete record of the worker's work history during this time is not available. He did however, start work with the accident employer in 1974 and the employer has no record of any problems for the period from 1974 to 1979. The Panel accepts the worker's evidence that he did not have ankle problems during the period from 1964 until 1974.

In the period from 1974 to 1979, the worker was performing a number of manual labouring jobs, including driving a dump truck, road repair, breaking up asphalt with a jack hammer, snow removal work and pick and shovel work.

The incident which occurred on January 31, 1979, does not appear to have been significant, since the worker returned to his regular job on February 7, 1979. What is significant is that the X-ray taken at the time revealed gross osteoarthritic changes in the ankle. However, from 1979 until November 26, 1981, there is no evidence of any ongoing ankle problems, nor any evidence that the worker's ability to perform manual labour was in any way impaired.

On November 26, 1981, the worker was descending from of a truck at work when he stepped on a rock and twisted his left ankle. He was taken immediately to a medical centre and then to a hospital where a cast was applied.

Except for a one day and a three day attempt to return to work, the worker was off work from the date of the accident on November 26, 1981, until April 6, 1982; a period of more than four months.

He returned to work in April, 1982, as a truck driver, a job which he testified he was able to perform, although he had continuing ankle problems. After six months, his job was changed to that of handyman, which involved more walking and other activities which caused him difficulty. Apparently, his supervisor helped him secure an easier job. The supervisor, when interviewed by a WCB investigator is reported to have said that he tried to keep the injured worker from excessive walking during the period from April 6, 1982, to March 20, 1984, although he was unable to recall any specific complaints from the worker in this interval.

The worker gave evidence that his supervisor helped him further by assigning him to trucks which did not require using a clutch since this movement caused him problems with his ankle.

A co-worker, who was interviewed by the Board's investigator, confirmed that the worker complained about his ankle almost on a daily basis between April 6, 1982, and March 20, 1984.

The Panel accepts this evidence and finds that the worker experienced an ankle disability during the years 1982, 1983, and 1984. Thus, it appears to the Panel that the worker never returned to his pre-November, 1981, condition.

On March 20, 1984, the worker was part of a road crew which was repairing a road cave in. He was required to walk on rough ground but does not recall twisting his ankle.

The next day, his foot was very swollen and he was taken to hospital, where he remained for about ten days. After some investigation, a diagnosis of septic arthritis was made.

A few days after admission to the hospital, the worker's right knee began to swell. An arthrotomy operation was performed on the right knee based on the diagnosis of septic arthritis. Upon further investigation, a rheumatologist determined that the worker had gout, and that this, in fact, accounted for his right knee problems rather than septic arthritis. A diagnosis of gout had been explored upon admission to the hospital and again prior to the knee surgery, but the diagnosis was not confirmed. However, the diagnosis of gout was established when the knee responded immediately to the drug Indocid.

The knee problem cleared up completely with the drug treatments and, according to the medical evidence, has not been a problem since. The left ankle condition, however, continued and was treated with a cast. The worker was off work until June 25, 1984, at which time he returned to work. He laid off again on July 31, 1984, and was once again put in a cast. He finally returned to work on September 4, 1984, and since that time has lost only a few days of work because of his ankle problems. In November, 1984, his job was changed to that of watchman. The worker testified that this change has been of great help to him in controlling his ongoing ankle problems.

In denying entitlement for the lost time in 1984, the Appeals Adjudicator noted in particular:

1. the pre-existing osteoarthritis,
2. the finding of gout and
3. a Board Medical Adviser's opinion that the lost time in 1984 was a direct result of the non-compensable ankle fracture in 1964 with the subsequent arthritis.

This Panel does not accept that the lost time in 1984 is attributable to gout. The diagnosis of gout appears to account for the right knee problem which arose while the worker was hospitalized in 1984. However, once this condition was correctly identified, and treated with medication, the right knee condition resolved and has not recurred. The left ankle problem however, has continued, and resulted in the lost time from work.

With regard to the medical evidence on the relationship between the 1984 ankle problems and the worker's earlier problems with his ankle, the Panel notes that the above mentioned opinion of the Board Medical Adviser is the only comment in the record from a physician as to the causation of the ankle problems in 1984. This opinion consists of the word "agree", which is handwritten on the bottom of a memo (#17) from a Claims Adjudicator.

The worker's attending physicians have not offered a direct opinion as to the cause of the worker's ankle problems in 1984.

However, on the basis of the X-ray in 1979 showing gross osteoarthritic changes, it is clear that the worker had a pre-existing arthritic problem in his left ankle. A number of medical reports in the materials suggest that the osteoarthritis is a result of the non-compensable motor vehicle accident in 1964. The medical reports note that the worker was not bothered by the arthritis until the 1981 accident. Dr. S. Gertzbein, an orthopaedic specialist, reported on November 27, 1981, as follows:

"His past history includes a serious fracture of his ankle treated in 1963. After this healed he had no problems except for one sprain a few years back. Since then he has been asymptomatic and has been working for the Borough of East York without problems."

On the basis of the worker's evidence and the medical reports, it appears to the Panel that the arthritic condition, although present, was not disabling until the work-related accidents; in particular, until the more serious accident in November, 1981.

The Panel concludes that the 1964 non-compensable motor vehicle accident likely gave rise to the arthritic changes in the worker's left ankle. These changes were noted in the 1979 X-rays. This underlying condition did not bother the worker until it was aggravated by the 1981 work accident, and again, by the 1984 work incident, to the point where the worker was disabled and lost time from work.

DECISION:

The appeal is allowed.

The Panel finds:

1. That the occupational accident of November 26, 1981, was significant and that the worker did not recover fully from it.
2. That the worker suffered an acute flare up of this problem at work on March 20, 1984, which caused him to be off work from March 21 to June 25, 1984, and again from July 31 to September 3, 1984.
3. As the panel was only directly concerned with the lost time in 1984, we make no finding as to any possible entitlement the worker may have for the period subsequent to September 4, 1984.

The WCB is accordingly directed to pay temporary total benefits for the period from March 21, 1984, to June 25, 1984, and the period from July 31 to September 3, 1984.

DATED at Toronto this 8th day of April, 1986.

SIGNED: L. Bradbury, D. Mason, B. Cook

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Workers' Compensation Appeals Tribunal

DECISION NO. 76

Tribunal d'appel des accidents du travail

Panel Chairman: I.J. Strachan

Member: B. Cook

Member: K. Preston



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION #76

THE APPEAL PROCEDURE:

The Employer has appealed the decision of the Workers' Compensation Board Appeals Adjudicator, A.G. Simpson, dated April 12, 1985 wherein the Adjudicator allowed the Worker's appeal and allowed a claim for:

1. temporary total disability benefits from October 4, 1984 until November 5, 1984 and
2. temporary partial disability benefits at 50% from November 5, 1984 and continuing for so long as the Worker remained under the on-going care of the family physician for treatment of his compensable disability.

The appeal was heard on February 18, 1986 by a Panel of the Appeals Tribunal consisting of I.J. Strachan, Chairman, B. Cook, a member representative of workers and K. Preston a member representative of employers (the "Panel").

The Worker appeared and was represented by M.G. Falco, while the Employer was represented by C. Sala. The Tribunal was assisted by J. Marshall who appeared on behalf of the Tribunal Counsel Office.

A Preliminary matter was raised by the Worker and Employer representatives in respect of the issue or issues on appeal before the Tribunal as set out in the Case Description.

PRELIMINARY ISSUES:

When the Employer representative and Worker representative filed written preliminary submissions at the commencement of the hearing, it immediately became apparent that the parties were not in agreement on the issues before the Tribunal.

In reviewing the submissions of the Employer, the Panel concluded there were four issues which the Employer wished to appeal. The four issues are as follows:

1. Entitlement of the Worker for a low back disability. It is the position of the Employer that the low back injury suffered by the Worker was not related to his employment and that the Worker suffered only a strain of the anterior chest wall.
2. The award by the WCB of a 20% permanent disability pension to the Worker.
3. Second Injury Enhancement Fund relief. The last line of the Employer's submission filed with the Panel reads:

"In view of the above evidence, I request all costs be removed from our statement that relates to the degenerative disc disease."

4. Appeals Adjudicator award of benefits subsequent to October 4, 1984. The Worker's representative submitted that it was only this narrow issue which came before the Tribunal since it was only this narrow issue which was ruled upon by the Appeals Adjudicator.

It is therefore necessary for the Panel to determine whether the matter should proceed on the narrow issue described in No. 4 above or the full range of issues (ie. No.'s 1-3 plus No.4).

THE PANEL'S REASONING:

To force the Worker to proceed on the broad range of issues was clearly prejudicial to the Worker's position since the Worker would be deprived of the opportunity to prepare and submit full argument on issues 1, 2 and 3.

On the other hand, the Employer argued an unsuccessful attempt had been made at the Appeals Adjudicator level to introduce additional issues and therefore full argument should be allowed on the appeal.

In the opinion of the Panel, it is unfair to the Employer to deprive the Employer of an opportunity of making full and complete argument on its case.

The Panel then considered Section 86g(2) which reads as follows:

The Appeals Tribunal shall not hear, determine or dispose of an appeal from a decision, order or ruling of the Board unless the procedures established by the Board for consideration of issues respecting the matters mentioned in clause (1)(b) or (c) have been exhausted, and the Board has made a final decision, order or ruling thereon.

(emphasis added)

Clearly the Appeals Adjudicator dealt only with the question of benefits subsequent to October 4, 1984; he had not dealt with the other three issues. Therefore the only issue properly before the Tribunal was issue #4.

In order that neither the Worker nor the Employer be prejudiced as a result of an administrative misunderstanding, the Panel allowed the Employer the option of either:

- (a) Proceeding with the appeal solely on issue No. 4, namely the entitlement to benefits for the period following October 4, 1984, or
- (b) Withdrawing the appeal (or adjourning the hearing) pending resolution at the WCB level of issues 1, 2 and 3 outlined above.

After consideration, the Employer elected to withdraw the appeal at this time and make application to the Board for a determination of issues 1, 2 and 3.

The appeal is therefore withdrawn without prejudice to the Employer's right to bring an appeal of any of the issues, including issue No. 4, at a later date.

DATED in Toronto this 17th day of March, 1986.

SIGNED: I.J. Strachan, B. Cook, K. Preston

Workers' Compensation Appeals Tribunal

DECISION NO. 78

Tribunal d'appel des accidents du travail

Panel Chairman: L. Bradbury

Member: F. Lankin

Member: R. Apsey



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

June 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 78

THE APPEAL PROCEDURE

The worker appeals the decision of the Workers' Compensation Board Appeals Adjudicator M. Prpic, dated October 26, 1984.

The appeal was heard on February 19, 1986, by a Panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, F. Lankin, a member of the Tribunal representative of workers, and R. Apsey, a member of the Tribunal representative of employers.

The worker attended and was represented by L. Sway. The employer was represented by E. Tulving-Blais, WCB Specialist, Occupational Health and Safety Division with the employer company. V. Mark assisted the Panel on behalf of the Tribunal's Counsel Office. The Panel read and considered the relevant forms, memoranda, and reports from the WCB file which were collected in the Case Description Materials and marked as Exhibit #1. The employer's representative provided written submissions which were marked as Exhibit #2. The worker's representative provided a further medical report from Dr. T.B. Costin which was marked as Exhibit #3.

The worker gave evidence under oath and was questioned by her representative, the employer's representative, and Ms. Mark. Submissions were made by Ms. Tulving-Blais, Ms. Sway, and Ms. Mark.

The worker's representative requested an affidavit from the employer as to an interview between the worker and the company with regard to the company's policy on attendance, sick leave, and injuries on duty. The Panel received the affidavit on April 14, 1986. The affidavit was also provided to the worker's representative who indicated to the Tribunal?????il 23, 1986, that she had no further submissions.

THE ISSUE AND HOW IT ARISES

The worker claims entitlement to compensation for the period from April 21, 1983, to May 26, 1983. The worker's claim arises out of work she was doing for the employer on April 18, 1983.

The worker's shift was from 5:00 p.m. until 9:30 p.m. five days per week. The worker testified that on April 18 at approximately 6:00 p.m. she was alone at the culling belt. She lifted a bucket of mail weighing about 30 pounds from the floor to the belt, a distance of about 3 feet. The worker stated that she felt immediate pain in her right shoulder and neck.

The worker's evidence is that although the pain lasted throughout the shift, she did not report the pain to anyone and there were no witnesses to the incident. She stated that she did not report it because she is not a complainer and she did not think the injury was serious.

The worker completed the remaining 3 1/2 hours of her shift. During those 3 1/2 hours, the worker testified that she had one 15 minute lunch break where she sat with co-workers. Her partner on the culling belt returned before the end of the shift. As well, the worker's supervisor was present in the area throughout the balance of the shift.

The following day, April 19, was the worker's scheduled day off. On April 20, 1983, the worker called her supervisor and said that she was "sick" and would not be in to work. The worker testified that she did not call her doctor since he works a half day on Wednesday and she slept until 11:30 a.m. by which time it was too late to reach him. The worker stated that on April 19 and 20 she rested and took Tylenol for pain.

On April 21, the worker saw her doctor, Dr. T.B. Costin. According to her evidence, she explained to her doctor what had happened and he said her condition was compensable. The doctor diagnosed a soft tissue injury of the worker's neck. The worker contacted her employer that day and said she would be off work on WCB compensation.

The employer reported the injury to the WCB on May 4, 1983, and indicated on the form that it doubted the history of injury because "the injury was not reported until 4 days after it was supposed to have happened".

The worker returned to work on June 2, 1983. She was granted entitlement to compensation initially. However, when the employer objected, the Claims Review Branch decided on January 24, 1984, that the worker's disability was not an accident in the course of employment.

The Appeals Adjudicator also denied entitlement on the basis that the delay in reporting and seeking medical attention, together with the absence of witnesses did not establish that the worker's disability was the result of an accident at work on April 18, 1983.

The issue for this Panel is whether the worker's neck disability and lost time from work resulted from a work incident on April 18, 1983.

THE PANEL'S REASONING

The worker's representative submitted that the appeal should be allowed for the following reasons:

1. The type of work the worker was doing could result in the injury diagnosed.
2. There was no evidence that the injury occurred outside work.
3. The worker made an error in judgement in not reporting the injury and she should not be penalized for the error or for her stoic attitude in not complaining about her pain.

The employer argued, on the other hand, that the appeal should be denied for the following reasons:

1. The worker had ample opportunity to mention her pain to her co-workers and her supervisor on April 18.
2. The worker had been advised one month earlier, in a personal interview, of the employer's requirements that any injury should be reported immediately - the worker's failure to report suggested an incident may not have occurred at work.
3. There is no evidence that an accident occurred at work and there is a complete lack of continuity between the date of the alleged incident and the reporting.

There is no dispute that the worker suffered a neck disability in April, 1983. The only question for this Panel is one of causation - did the disability arise out of the work the worker performed on April 18. On the face of it, the worker's description of events suggests that it is reasonable to link her neck disability with her work. She was lifting a heavy container and felt immediate pain in her right shoulder and neck. The Panel, however, is concerned about the same matters that concerned the Appeals Adjudicator; they are, that the worker worked 3 1/2 hours, in pain, without mentioning that pain to anyone. She was in contact with fellow workers, she had a partner on her machine, her supervisor was close by, and yet the worker said nothing.

The Panel is also concerned about the worker's evidence that she did not recall the company's policy on immediate reporting of injuries. The worker stated she did not know her neck pain was serious and therefore did not report it. In ordinary circumstances this explanation would likely be accepted and a three day delay in seeking medical attention and reporting would not necessarily be fatal to a worker's claim. In this case, though, the worker was presented with evidence that she was interviewed on March 14, 1983, by her supervisor, Mr. R. Buick, specifically on the issue of absence from work. According to the employer, every worker was seen individually, provided with a pamphlet and told how important it was to report even minor injuries immediately. The worker was unable to recall the interview, although at the Appeals Adjudicator hearing she recalled something occurring in March. At the hearing before this Panel, the worker could not recall anything. The Panel does not accept the worker's statement that she cannot recall the interview. An interview like that would be an unusual event in the working routine and is something she would likely remember. As well, the employer presented affidavit evidence indicating that the worker was interviewed on March 14 at 20:45 p.m.

Having found that the worker's evidence on the question of the interview is not credible, the worker's credibility on the other matters is called into question. In addition to the failure to report an incident at work on April 18, the worker called in sick on April 20. She mentioned nothing about a work incident or neck pain at that time either. It was not until April 21, after seeing her doctor, that the worker notified the employer of a compensable problem. The Panel is not satisfied that these circumstances support the worker's claim of a work incident on April 18.

The worker's representative suggested that, because there was no evidence that the injury occurred outside her employment, the appeal should be granted. This Panel agrees with the British Columbia Workers' Compensation Board that a speculative possibility of a connection between the work done and the disability is not enough. There must be some evidence of a work relationship and that evidence

will vary from case to case.¹ The Panel finds, in this case, that the facts which would bring the provisions of the Act into play to grant the worker entitlement to compensation are missing; that is, facts which support the worker's claim that her disability was caused by an accident which arose out of and in the course of her employment.

DECISION

The appeal is denied.

DATED at Toronto this 10th day of June, 1986.

SIGNED: L. Bradbury, F. Lankin, R. Apsey.

¹Decision No. 286, 16 October 1978, British Columbia WCB Reporter.

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Workers' Compensation Appeals Tribunal

Decision No. 79

Tribunal d'appel des accidents du travail

Panel Chairman: A. Signoroni

Member: S. Fox

Member: D. Mason



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 79

THE APPEAL PROCEDURE:

This is an appeal by a worker of the July 18th, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, M.C. Turner. The decision under appeal confirmed the ruling made by the Board's Claims Review Branch dated October 31st, 1984.

The appeal was heard on February 19th, 1986, by a panel of the Appeals Tribunal consisting of A. Signoroni, Panel Chairman, S. Fox, a member of the Tribunal representative of workers and D. Mason, a member of the Tribunal representative of employers.

The worker appeared and was represented by Mr. J. Trufal, National Coordinator, United Electrical, Radio and Machine Workers of Canada. The worker's son attended as an observer. No one appeared on behalf of the employer. The Tribunal was assisted by its counsel, J. Marshall, a member of the Tribunal's Counsel Office.

The Panel heard and considered testimony under oath of two neighbors of the worker who were called by the worker, and testimony under oath of the worker herself. An interpreter of the Italian language was present to assist the worker and the two witnesses.

The Panel also had the benefit of the history of the incident and claim as it appears in the Case Description materials accepted by the worker's representative as accurate. The Case Description was marked as Exhibit #1 at the hearing.

Submissions were made by the worker's representative and by the Tribunal Counsel.

THE ISSUE AND HOW IT ARISES:

The worker is claiming entitlement to benefits for the period from July 6th, 1984, to October 9th, 1984. The worker's claim arises out of work she was doing in March of 1979 on the basis that her left ankle condition in 1984 resulted from the accident suffered five years earlier.

Employed for some fifteen years, the worker was sweeping in the card room of her employing company on March 22nd, 1979, when she slipped and fell on some oily cotton, twisting her left ankle.

An elastoplast bandage was applied on her left ankle when she visited Dr. Rice, the employer's doctor, and she was then able to resume her work. The following day the worker complained of pain in her left foot and was given pills by the employer's nurse.

That same day she visited the casualty officer at the local hospital who ordered X-rays and a tensor bandage application. The diagnosis was "sprained left foot". Likewise, the company's first aid records on the worker disclosed that the plant doctor was seen on March 22nd and 23rd, 1979.

In her testimony the worker related the events of the 1979 accident as follows. Although still in pain the following days, the "boss" made certain that she would not take time off. Because of these pressures she was "scared" of complaining to her foreman who would only "yell" at her. However, to make her work easier, she was given help for three days as of March 23rd, 1979. The helper did most of the work but she continued to carry on her usual job, only less of it and at a slower pace.

Although she continued to have pain, "all the time", she testified that she did not see her family doctor regarding this incident. Doing the best work she could do under the circumstances, she continued working as a sweeper in the card room of the employer.

On June 2nd, 1980, the worker fell again and strained her left knee and ankle. In her testimony she described the incident by saying that she had twisted her left ankle and for a while she could not put her foot on the floor. She further indicated that this incident would not have happened had she seen her doctor back in 1979.

The records of the employer indicate that the plant doctor was seen the day of the incident. The presenting problem, as then recorded, was "twisted her left ankle -- did not step or trip, just turned ankle -- no swelling". Ice packs were the only treatment proposed.

On June 2nd, 1980, the worker was also seen by Dr. J.L. White, the family doctor, who recorded his examination as follows :

"She had fallen at work and strained the lateral ligament of the left ankle and the medial ligament of the left knee."

The family doctor also ordered X-rays which showed her left ankle as normal and saw the worker again on June 9th, 12th and July 4th, 1980. In her testimony the worker confirmed that by July, 1980, her knee had recovered while her ankle, though improved, continued to be "slightly painful". There was no lost time from work resulting from this incident.

The worker testified that she did not suffer any other injury to her left ankle between June, 1980, and July, 1984, while not at work. This was testimony consistent with the evidence received from the two witnesses called by the worker.

However, in 1984 the worker reported to the WCB investigator that she had a compensable right ankle injury in 1983. At that time the worker was off work one week. After her return to work, no further problems resulted from this injury. These facts were confirmed as correct by the worker at the hearing.

According to the worker's testimony, the absence from work on July 6th, 1984, was due to pain and swelling which began on the previous day.

Throughout the period from June, 1980, to July, 1984, the worker confirmed having worked continuously, with the exception of the one week absence from work in 1983, as a sweeper with the same employer with no changes in her work duties.

She stated, however, that "she was always in pain but kept quiet about it". Meanwhile she fought back the pain, without success, with aspirin, Bufferin and regular massages. Her children knew of her condition, as did her friends at work and in her neighbourhood, all of whom saw her limping.

When further questioned about her failure to complain the worker maintained that she always felt pain but other than her family and friends she did not complain to the employer's nurse, the employer's doctor, the foreman, the union representative or the family physician. For this conduct the worker showed regretfulness throughout her testimony under oath. Each time when pressed to explain herself more clearly in this regard, she kept repeating "being afraid to complain".

The testimony offered by the two neighbors was similar. Both had known the worker for many years in an "off the job" relationship only. One had known the worker in Italy. They were aware that the worker had a work accident years ago, but could not recall any dates. Both testified that the worker kept complaining of pain but could not be more specific in their limited use of the language. Finally, both witnesses testified that they observed the worker limping from time to time.

Although the family doctor, in his report to the Board dated November 5th, 1984, states that prior to the July, 1984, visit he had seen her "many times during 1981, 1982 and 1983" the worker, in her testimony, confirmed that she did not tell the doctor about her left ankle. Once again, the reason offered was that had she told him about the pain, he would have ordered her to stay at home and she was afraid of this possibility.

During the course of the July, 1984, visit, the family doctor reported the worker telling him that her left ankle had been swelling for one week.

On July 13th, 1984, while the family doctor was on vacation, the worker was seen by Dr. Rice, the employer's doctor. His notes are as follows :

"Twisted left ankle five years ago in card room. Claims since then her left ankle has been sore off and on. On July 6th, 1984, when she woke up her left ankle was swollen and sore. She has trouble walking since. Walks with a definite limp favouring left foot. To X-ray. Apparent tenderness over anterior talo tivial ligaments. It is hard to believe that she would be able to work for years after her injury and then without further injury her condition got much worse."

The worker was then referred by Dr. Rice to Dr. Z.L. Szabo, an orthopaedic surgeon. In his first report dated August 2nd, 1984, he noted swelling on the outer side of the left ankle, negative findings regarding fractures and osteoarthritis on the medial malleolus (the malleolus being the protuberance on the side of the ankle joint at the lower end of the tibia).

On August 24th, 1984, Dr. Szabo reported that the Unna paste plaster applied on August 2nd, 1984, was removed from the left foot. Although improvement was noted there was still swelling.

The worker last saw her family doctor on October 1st, 1984, before her return to work on October 9th, 1984, when he again referred her to Dr. Szabo.

In his last report dated January 15th, 1985, Dr. Szabo wrote:

"I think this lady has a phlebitis but the Homan's sign is negative."

Phlebitis is a disease commonly known as inflammation of a vein, the cause of which is largely unknown.

Upon her return to work on October 9th, 1984, the worker remained in her usual employment until the employer's plant closed down in January, 1985.

The Claims Review Branch, in accepting the advice of the Board's Medical Advisor, concluded that it has not been established that the worker's left ankle problem in July, 1984, is causally related to the injury sustained on March 22nd, 1979. This decision was confirmed by the Appeals Adjudicator, the decision under appeal.

The issue for this Panel, therefore, is whether the 1984 disability resulted from the accident of March 22nd, 1979, and/or June 2nd, 1980.

THE PANEL'S REASONING:

The worker's representative submitted that the appeal should be allowed. His main arguments were as follows:

1. After the accident in 1979, the evidence is unequivocal regarding continuity of complaints.
2. There were no other incidents, either at work or off work, after the June 2nd, 1980, recurrence from which the 1984 disability may have resulted.
3. The worker should not be penalized for having had a stoic attitude during the years from 1979 to 1984.
4. Insofar as the presence of osteoarthritis, diagnosed in 1984, it could be attributed to the accident of 1979 and its consequences.

In deciding whether the 1984 disability resulted from the 1979 injury, this Panel has considered: the injury caused by the 1979 accident and the subsequent injury caused by the 1980 accident, the worker's condition between June, 1980, and July, 1984, and the disability suffered in 1984.

There is no dispute that the worker suffered two compensable accidents in March, 1979, and in June, 1980. In each instance, she injured her left ankle. In 1980, her knee was also partly injured. However, from the limited medical evidence available, such as the findings from the X-rays taken, it is only possible to conclude that the worker did not suffer a serious injury each time.

This was also evidenced by the fact that the worker was able, on both occasions, to resume her duties even though in 1979 she could do less work and the work was done at a slower pace for a few days. Although the 1980 accident is more clearly documented due to the fact that the worker at that time saw fit to also see her family doctor, something not done in 1979, there is no indication that the 1980 accident was in any way a re-occurrence resulting from the original accident in 1979.

The evidence available regarding the worker's condition between June, 1980, and July, 1984, is contradictory. On one hand, we have the oral testimony of the worker and the two neighbors indicating continuous pain and limping. On the other hand, we have the remarks from the foreman, as they were recorded by the investigator, to the effect that the worker never complained to him regarding any pain in her left ankle and was never observed limping while at work.

While the Panel is reluctant to reach a finding of lack of credibility regarding the testimony offered by the worker and the two neighbors it is nonetheless obliged by the facts as found, to question the position advanced by the worker for several reasons.

Firstly, while the worker repeatedly said that she was reluctant to stay home from work and for this reason alone did not seek medical attention, afraid that she would be ordered to do the very thing she was avoiding, she did not hesitate to remain off work for a week in 1983 when she injured her right ankle.

Secondly, even though she initially testified never having seen a doctor between 1980 and 1984 she later admitted being attended by her family physician during 1981, 1982 and 1983 but still did not avail herself of these opportunities to discuss the pain in her left ankle. This conduct is, however, inconsistent with other instances when she did not hesitate to seek medical help if considered necessary at the time because of the symptoms present.

Thirdly, the testimony received from the two witnesses indicates that the worker was limping from time to time. Even though the worker saw her family physician many times during 1981, 1982 and 1983, Dr. White does not report ever having noticed such condition.

On these grounds the Panel is of the view that the worker, who was able to work at her usual job for years after the injuries of 1979 and 1980, did not disclose any sign of non-disabling pain during the period under consideration.

The disability suffered in 1984 was diagnosed as a swollen left ankle which, according to the testimony given by the worker to Dr. White, had been swelling for one week. Once again the X-rays, including the forced inversion pictures, did not disclose any findings regarding fractures. On the contrary, osteoarthritis was noticed on the medial malleolus.

COMPENSATION:

A worker is entitled to full compensation if she or he is temporarily totally disabled and the disability results from an injury which is caused by an accident arising out of and in the course of employment.

In this case there were two work-related accidents, the first in 1979 and the second in 1980. They caused the injury of the worker's left ankle. The issue then, is whether the disability suffered by the worker in 1984, once again a swollen left ankle, resulted from the accident of March, 1979, and/or June, 1980.

The medical evidence dealing with this issue is that of four physicians.

The first doctor to comment about the possible cause of the 1984 disability is Dr. Rice, the employer's doctor. His comments are as follows:

"It is hard to believe that she would be able to work for years after the injury and then without further injury her condition got much worse."

While Dr. Szabo was the first doctor to indicate the presence of osteoarthritis, in his report dated August 2nd, 1984, he is silent regarding the issue of causation of what appeared to him as a "twisted left ankle". Incidentally, he was mistaken in reporting that the incident took place at work.

It should, however, be noted that Dr. Szabo, in a subsequent report dated January 15th, 1985, advanced the likelihood that the worker may have phlebitis even though a classical test which usually establishes the presence of this disease was negative.

According to the family physician osteoarthritis is possibly the cause of the 1984 disability and "this could well be related to her injury of June 2nd, 1980".

Finally, a medical advisor from the WCB who was requested to review this case, without examining the worker, came to the opinion that the present left ankle problem is not related to the minor injury of 1979.

Aside from the comments of the family physician who talks about a possible relationship between the 1984 disability and the other two accidents, the evidence does not support the claim argued by the worker's representative. For these reasons, the Panel is of the view that the 1984 disability in issue did not result from the accidents of 1979 and/or 1980.

DECISION:

The appeal is dismissed. The worker's entitlement to compensation remains as determined by the Workers' Compensation Board Appeals Adjudicator.

DATED at Toronto, Ontario this 20th day of March, 1986.

SIGNED: A. Signoroni, S. Fox, D. Mason

CA24N
L95
- D21

Workers' Compensation Appeals Tribunal

DECISION NO. 80

Tribunal d'appel des accidents du travail

Panel Chairman: L. Bradbury

Member: S. Fox

Member: J. Ronson



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

Telephone: (416) 962-1600

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 80

THE APPEAL PROCEDURE

This is an appeal by the worker from a decision of the Workers' Compensation Board Appeals Adjudicator, J.V. D'Andrea, dated June 26, 1985.

The appeal was heard on February 20, 1986, before a Panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, S. Fox, a member of the Tribunal representative of workers, and J. Ronson, a member of the Tribunal representative of employers.

The worker appeared and was represented by R. Blair. A Spanish interpreter was present for the worker. The employer was represented by D. Greer, General Manager. A. Godin was present from the Tribunal's Counsel Office. The Panel read the Case Description recital of facts prepared by Tribunal's counsel and agreed to by the parties. The Panel also read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials.

In addition, both Mr. Blair and Mr. Greer provided the Panel with written submissions which they referred to during the hearing.

THE ISSUE AND HOW IT ARISES

The issue before the Panel is whether the worker is entitled to have any of his supplementary benefits under section 43(5) of the Worker's Compensation Act continued for the period from January 16, 1984 to April 23, 1984, (or for any part of that period) while he was on vacation in Ecuador.

The facts of this case are straightforward. The worker injured his lower back on April 1, 1980. He received temporary total compensation until March 22, 1982, when he was granted temporary partial 50% compensation.

In January, 1983, the worker was awarded a 15% permanent disability pension for his back. At the same time, he was granted a supplement up to 100% under section 43(5) of the Act. The worker continued to receive the supplement until January 16, 1984, when he left for Ecuador. The worker's evidence was that he went to Ecuador for two reasons: to receive treatment for his back and to be with his family. The evidence indicates that he notified WCB of his intention prior to leaving. WCB advised the worker that his supplement would be discontinued while he was in Ecuador.

¹Unless otherwise stated, all section references are to the section numbers as they existed prior to April 1, 1985.

The worker had taken two previous trips to Ecuador in September, 1980, and November, 1981, for treatment. On each occasion, his supplementary compensation benefits had been withheld by WCB and then restored and backdated on his return.

Prior to leaving for Ecuador in January, 1984, the worker completed a six month English as a Second Language Course at Canbraz under the auspices of the WCB Vocational Rehabilitation Division. The evidence indicates that the worker had a record of co-operating with Rehabilitation Services.

On his return from Ecuador in April, 1984, the worker contacted WCB, provided medical documents to the Board from his doctor in Ecuador and from his doctor in Toronto, and began a job search. The worker's rehabilitation file was reopened and he was eventually granted a supplement from April 24, 1984, until his return to work in November, 1985.

The worker's representative argued that the Panel should apply the WCB policy on Vacations While Disabled, (C.A.B. Procedures Manual, Document Number 33.19.24) and grant the worker entitlement to supplementary payments during the period he was in Ecuador in accordance with that policy.

The employer's representative argued that the worker failed to meet the requirements of section 43(5) for a supplement during the period in question in that he was not available for suitable employment while in Ecuador.

The Appeals Adjudicator concluded that the worker was not entitled to a supplement because, while in Ecuador, he was not available for medical or vocational rehabilitation programs. The Adjudicator also noted that the worker was no longer temporarily disabled but permanently disabled and in receipt of a pension from WCB. The Adjudicator appears to imply that the WCB policy on Vacations While Disabled would, therefore, not apply to the worker.

THE PANEL'S REASONING

The worker was receiving a supplement under section 43(5) of the Act prior to leaving for Ecuador in January, 1984. Section 43(5) sets out the following criteria which must be met in order for a worker to continue to receive a supplement:

1. he must co-operate in and be available for a medical or vocational rehabilitation program or
2. he must accept or be available for employment which is available and suitable.

However, the WCB has established a policy and certain procedures that apply to the payment of compensation when a disabled person, who is receiving compensation under sections 39, 41 and 42 (now section 43), takes a vacation. This policy includes people who are receiving supplements as in this worker's case.

The general policy is set out in C.A.B. Procedures Manual, Document Number 33.19.24 and states that compensation (including supplements) may be continued during a vacation "providing that the request for vacation is reasonable and the length of vacation will not unduly interfere with treatment or prolong or enhance the disability". There are six criteria set out under the policy, as follows:

- (a) the vacation should not unduly interfere with treatments;
- (b) it should not prolong or enhance the disability;
- (c) the taking of the vacation should be reasonable;
- (d) the claimant must have been co-operative with vocational rehabilitation services;
- (e) the vacation should not interfere with an opportunity for employment during the period of the vacation; and
- (f) the vacation should not interfere with an assessment program.

The question for this Panel is whether that policy applies to the worker in this case and, if it does, how much vacation time is he entitled to.

The employer argued, and his argument was upheld by the Appeals Adjudicator, that the worker was not entitled to the supplement while out of the country because he was no longer available for work or for a medical or vocational rehabilitation program as required by section 43(5).

The evidence, however, is that the worker had just completed a vocational rehabilitation program and no further rehabilitation program was planned, nor was he under active medical treatment. Thus, a vacation in these circumstances would not interfere with a rehabilitation program or medical treatment and appears to be reasonable.

The more troublesome question is whether the time in Ecuador was unreasonable in that it interfered with the worker's availability for work which was available and suitable. The evidence indicates that the worker, having recently completed his English course, had not begun a job search prior to leaving for Ecuador. There is no evidence before the Panel that the worker's rehabilitation counsellor had identified any employment which was available to the worker.

The worker had been assessed earlier by the WCB Vocational Rehabilitation Division. The English as a Second Language course which the worker attended until January, 1984, was arranged by rehabilitation because it was felt that his job opportunities would be increased if he was more proficient in English. When the worker's rehabilitation file was reopened in June, 1984, after he returned from Ecuador, he was classified as "not job ready" considering his "physical capabilities, his acceptance of his disability, and his inadequacy in the English language". (Report of J. Tighe, June 11, 1984.)

The Panel finds that the reasons given for the classification of "not job ready" likely existed as well in January, 1984, when the worker left for Ecuador. The Panel accepts, therefore, that the worker was not ready for work in January, 1984.

The worker's evidence was that he went to Ecuador primarily to see whether the mineral baths would improve his physical condition. It appears from the evidence that he began a job search shortly after his return to Canada in April, 1984, and his supplement was reinstated.

In these circumstances, the Panel finds that, at the time the worker left for Ecuador in January, 1984, there was no employment which was available to him, nor was he ready, at that point, to work.

The Panel finds that, in the circumstances, it was not unreasonable for the worker to return to Ecuador in January, 1984. He had completed his vocational rehabilitation program, there were no employment opportunities available to him, there was no assessment program in progress and there was no ongoing medical treatment program. The worker provided a letter to WCB from his doctor prior to leaving for Ecuador. Dr. L. Carreno wrote on January 5, 1984:

"(The worker's) condition is about the same. He wants to go to Ecuador to try their salt bath treatment. He may improve with this treatment."

Thus, it would appear that the treatment the worker contemplated would not prolong his disability or make it worse.

These findings bring the worker within the WCB policy criteria for payment of compensation during vacations. The Panel concludes that the worker is entitled to receive the supplement in accordance with the policy.

The next question for the Panel, therefore, is the length of time the worker is entitled to receive compensation during the time he was in Ecuador. The worker's representative argued that the WCB policy entitles a worker to a minimum of three weeks per year. He also argued that one could "bank" those three weeks from year to year. In this case, since the worker had not had a vacation for 2 years, Mr. Blair argued that the worker should be entitled to at least 6 weeks, under the Policy.

The policy guidelines provide "vacation periods of three weeks or lesser duration occurring not more than once per year shall not warrant the reduction of benefits...". The Panel finds, on a plain reading of these words, that the argument for "banking" of vacation periods cannot be supported.

The worker's representative also argued that the Panel should exercise its discretion which is provided for in the policy guidelines, and grant the worker entitlement to more than three weeks' vacation. The guidelines state:

"Situations not coming within the guidelines outlined above shall be dealt with based on the individual circumstances involved."

In this case, the Panel is not prepared to find that the worker is entitled to more than three weeks under this policy. Had the worker returned to Canada after three weeks, the rehabilitation division may well have provided him with further assistance, both with language training and employment training, which would have facilitated his return to work at an earlier date. Also, a lengthy stay outside an English-speaking environment was not calculated to provide any reinforcement for his language training.

DECISION

The appeal is allowed in part. The worker is entitled to receive 3 weeks' supplementary benefits under section 43(5) during the period he was in Ecuador from January 16, 1984.

DATED at Toronto this 28th day of April, 1986.

SIGNED: L. Bradbury, S. Fox, J. Ronson

CA24N
L 95
- D 21

Workers' Compensation Appeals Tribunal

DECISION NO. 81

Tribunal d'appel des accidents du travail

Panel Chairman: I.J. Strachan

Member: D. Jago

Member: B. Cook



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

Telephone: (416) 962-1600

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION #81

THE APPEAL PROCEDURE:

The worker appeals the decision of Mr. L. Carr, Workers' Compensation Board Appeals Adjudicator, dated June 27, 1985.

The appeal was heard on February 21, 1986, by a panel of the Appeals Tribunal consisting of Ian J. Strachan, Chairman, Doug Jago, a member of the Tribunal representative of employers and Brian Cook, a member of the Tribunal representative of workers.

The worker appeared and was represented by Mr. Colin Ewing of the Metro Toronto Police Association. The employer was represented by Mr. Gary Phillips, Occupational Health and Safety Supervisor.

The Tribunal was assisted at the hearing by Ms. Marsha Faubert, a member of the Tribunal Counsel Office.

The Panel heard the testimony of the worker under oath. The relevant portions of the WCB file and the description of the case prepared by Ms. Faubert were read by the panel and the parties and were marked as Exhibit #1. Prior to the hearing, the worker submitted a signed statement from a co-worker and an affidavit from his supervisor. These were marked as Exhibits 2 and 3 respectively. The worker brought to the hearing a letter from the Intercity Orthopaedic and Sports Medicine Centre which, with the agreement of the employer, was accepted as evidence and marked as Exhibit #4.

Submissions were made by the representatives of the worker and the employer.

THE ISSUES AND HOW THEY ARISE:

The worker is a police officer. His regular job duties include attending at places where crimes have occurred to collect evidence, including photographs and fingerprints and forensic evidence. He also prepares such evidence in a darkroom and at his office.

On July 26, 1984, the worker sustained a back injury in the course of his employment as a result of a lifting, twisting acting while the worker was taking a ten pound field kit out of his stationwagon.

He saw his family doctor the next day who diagnosed a lumbar sacral strain. His doctor instructed him to perform exercises to strengthen his back and prescribed a muscle relaxant and a pain killer.

The worker returned to his regular job on August 14, 1984. Temporary total benefits were paid by the WCB for the lost time.

On February 12, 1985, the worker was leaning into his refrigerator at home and experienced an excruciating attack of pain. He sought medical attention from his family doctor the next day and the diagnosis of lumbar sacral strain was again given. The worker attended seven physiotherapy treatment sessions in March and returned to work on March 26, 1985. The worker has been pain free since that time.

The worker's claim for Workers' Compensation benefits for the period February 13 to March 25, 1985 was denied by the WCB. The Appeals Adjudicator concluded that the back problem subsequent to February 12, 1985 was not related to the compensable incident of July 26, 1984, but rather was solely a consequence of reaching into the refrigerator.

The issue before the Panel therefore is whether the period of disability from February 13 to March 25, 1985 resulted from the compensable injury which occurred in July, 1984.

THE PANEL'S REASONING:

The Panel concludes that, on a balance of probabilities, the low back disability which caused the worker to be off work from February 13 to March 25, 1985 was causally related to the original incident of July 26, 1984.

The Panel accepts the evidence of the worker that he continued to experience low back pain between his return to work in August and the second lay-off in February, 1985. We note that this evidence is supported by the information contained in the Board's file and the new written evidence submitted at the hearing. This evidence confirms that the worker experienced pain in the period in question and made some minor adjustments to the way he performed his duties so as to ease his pain and discomfort.

We also accept the worker's evidence that he took the prescription drugs which he had been given in July, 1984, on an occasional basis between August and February and that he performed at least some of the back exercises suggested by his doctor. We also accept that there were no other injuries sustained by the worker which could have contributed to or caused his problem.

We further note that the family doctor supported a relationship between the original and subsequent problem in his report to the Board of February 15, 1985.

It appears to the Panel therefore that it is more probable than not that:

- (a) the worker sustained a lumbar sacral strain on July 26, 1984 from which he did not fully recover following his return to work on August 14, 1984 and
- (b) the movement involved in reaching into the refrigerator in February, 1985, caused a flare-up of the problem which was sufficient to disable the worker until March 26, 1985.

The disability in February and March, 1985, was a recurrence of the compensable disability. It resulted from the compensable injury of July, 1984. It is therefore also compensable.

DECISION:

The appeal is allowed. The Panel finds that the worker suffered a disability on February 12, 1985 which caused him to remain off work until March 26, 1985. This was a recurrence which resulted from the July, 1984 compensable injury. The Workers' Compensation Board is therefore directed to pay temporary total disability benefits for the relevant period. The Panel leaves to the Board the calculation of the amount of appropriate benefits.

DATED at Toronto this 17th day of March, 1986.

SIGNED: I.J. Strachan, B. Cook, D. Jago

CA24N
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- D21

Overseas
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Workers' Compensation Appeals Tribunal

DECISION NO. 83

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: D. Jago

Member: S. Fox



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

Telephone: (416) 962-1600

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 83

IN THE MATTER OF an action commenced
in the Provincial Court (Civil Division)
as Action C19727;

AND IN THE MATTER OF an application
pursuant to Section 15 of the Workers'
Compensation Act, R.S.O. 1980, c. 539,
as amended.

B E T W E E N:

RAFFAELE BELTRANO

Applicant in this application
and Defendant in the Provincial
Court Action.

- and -

TIMOTHY MOYNIHAN

Respondent in this application
and Plaintiff in the Provincial
Court Action.

WORKERS' COMPENSATION APPEALS TRIBUNAL

THE S.15 APPLICATION

This s.15 application arises out of a lawsuit between the Plaintiff, Mr. Timothy Moynihan, and the Defendant, Mr. Raffaele Beltrano. The lawsuit is actually a subrogated claim by the Corporation of the City of Toronto, with whom both the Plaintiff and the Defendant were employed at the time of the alleged incident.

The application was heard on February 25, 1986 by a panel of the Appeals Tribunal consisting of J. Thomas, panel chairman, D. Jago, a member of the Tribunal representative of employers, and S. Fox, a member of the Tribunal representative of workers.

The applicant was Mr. Beltrano, who attended and was represented by Mr. S. Manella, solicitor. Mr. Moynihan appeared without representation. The employer was represented by Mr. Weretelnyk, from the employer's legal department. Mr. J. Waese also attended from the employer corporation. Z. Onen from the Tribunal Counsel Office assisted the panel.

The panel heard and considered evidence given under oath by the Plaintiff and the Defendant in oral testimony and read the factums provided by the Defendant and the employer, which factums were marked exhibits 1 and 2 respectively. A job description for the Plaintiff's position was entered as exhibit 3. Submissions were made by Mr. Manella and by Ms. Onen.

THE ISSUE AND HOW IT ARISES

Mr. Moynihan and Mr. Beltrano worked together under the employ of the Corporation of the City of Toronto. On February 26, 1982 they both were working at the EarlsCourt Ice Rink on the afternoon shift which commenced at 4 p.m. and continued until midnight. Mr. Moynihan's position was that of Refrigerator Compressor Operator, while Mr. Beltrano's was that of general workman.

At approximately 10 p.m. Mr. Beltrano punched Mr. Moynihan in the jaw. Different versions of the circumstances leading up to the assault were recounted by the two individuals in their oral testimony to the Appeals Tribunal, of which more will be said later. Mr. Moynihan suffered injuries as a result of the incident.

Around April 16, 1982, Mr. Moynihan elected to claim compensation under Part 1 of the Worker's Compensation Act rather than sue Mr. Beltrano. This election is available to workers under s.8(1) of the Act so long as the accident arose out of and in the course of employment and, in addition, the circumstances entitle the worker to an action against some person other than his employer, or an executive officer or director thereof.

In electing to claim benefits rather than suing Mr. Beltrano for assault, Mr. Moynihan transferred to his employer the right to bring an action for assault against Mr. Beltrano. The employer in this case is a schedule 2 employer and is individually liable to pay compensation. S.8(4) provides that where a worker has elected to claim benefits, the individually liable employer is subrogated to all rights of the worker or his dependants and the employer may maintain an action in the name of the worker or of the employer against the person against whom the action lies. The subsection goes on to require the employer to pay to the worker any surplus received as a result of the lawsuit over and above the amount paid to the worker in the form of compensation benefits.

The employer commenced an action against Mr. Beltrano in the name of Mr. Moynihan, claiming damages for assault.

Mr. Beltrano's lawyer then commenced this application under s.15 of the Act. Normally, a Defendant to a lawsuit comes to this Tribunal for a determination that the Plaintiff's right to sue has been taken away by the Act. What Mr. Manella, on behalf of the Defendant, asked the panel to determine was the question of the plaintiff's right to compensation under Part 1.

He urged the panel to find that the Plaintiff's injuries did not arise out of or in the course of his employment. If the Plaintiff's injuries had not arisen out of or in the course of his employment, he would not have had the option of electing under s.8(1). His only recourse would have been to commence an action against Mr. Beltrano, claiming damages for assault. The employer would not be able to proceed with the subrogated action if Mr. Moynihan could not elect under s.8(1). Thus, the purpose of this application would appear to be purely tactical. The lawsuit would still exist if the application were successful. However, the Plaintiff would no longer be entitled to compensation benefits which he received some four years ago and he would have to proceed on his own with the lawsuit.

THE PANEL'S REASONING

During the hearing of this application the Plaintiff and the Defendant were questioned by Mr. Manella, by Ms. Onen and by members of the panel.

According to Mr. Beltrano, just before 10 p.m. he was in the office with Mr. Moynihan. Mr. Moynihan appeared to be upset and was complaining about personal matters. Mr. Beltrano went out to clean the rink while Mr. Moynihan was on the telephone. A short time later someone came up behind Mr. Beltrano and began to swear at him. Mr. Beltrano said he was scared and confused and he turned around and punched the person in the jaw. Then he realized that it was Mr. Moynihan, who had fallen to the ice.

Mr. Moynihan told the panel that he and Mr. Beltrano had agreed, prior to going out onto the rink at 10 p.m. that they would clean the hockey rink together, following which Mr. Beltrano would flood the hockey rink while Mr. Moynihan continued on to clean the pleasure rink. Apparently, according to Mr. Moynihan, Mr. Beltrano changed his mind, and when Mr. Moynihan started to clean the pleasure rink, Mr. Beltrano became upset and said "you're not telling me what to do!", following which he punched Mr. Moynihan in the jaw.

Mr. Manella's position is that an accident caused by a tortious act of a co-worker cannot be said to arise out of and in the course of employment. It was his view that the accident must involve a risk which is incidental to the employment. The risk of injury by assault, in his view, is not incidental to the employment. Moreover, Mr. Beltrano's conduct clearly took him outside the course of his employment. Mr. Moynihan's conduct in swearing at Mr. Beltrano and in attempting to give orders, which was not part of his duties, took him outside of his own employment.

Mr. Manella referred the panel to several authorities in support of his position. We note that none of the authorities are from this jurisdiction, although they refer to legislation similar to the Ontario Act.

When the incident occurred, both employees were on the employer's premises. Mr. Moynihan had certain supervisory responsibilities which were not shared with Mr. Beltrano. His job description required him to exercise direction over 2 to 3 labourers and 1 to 2 rink guards. The duties were not distinctly defined. Both men knew their jobs and there appears to have been little need for constant supervision.

In these circumstances we find it difficult to understand how Mr. Moynihan was not carrying out his duties at the time of the incident, regardless of which version of events we consider. On his own account he was in the process of cleaning the pleasure rink when he was assaulted. In Mr. Beltrano's version of events, Mr. Beltrano was cleaning the rink and Mr. Moynihan came up behind him, albeit angrily, for a purpose which was never discovered because of the assault. Mr. Beltrano could not say whether Mr. Moynihan was intending to give instructions, to help with the rink, or just cause trouble because he assaulted him as soon as he heard someone swearing at him.

Given the very general nature of the duties assigned to these employees, we cannot conclude, even from Mr. Beltrano's evidence that Mr. Moynihan was other than in the course of his employment.

We are of the view that it would be inconsistent with the overall objective of the Act to deny entitlement to compensation to an innocent victim injured in the course of his employment. The Act was intended to provide workers with an expeditious method of obtaining no fault compensation for accidents arising out of and in the course of employment. Where the innocent victim is in the course of carrying out his normal duties and is injured as a result of the tortious acts of a co-worker, he ought to be able to avail himself of the election in s.8(1).

This does not, of course, mean that the perpetrator, if injured during the assault, can necessarily claim compensation. Indeed, the perpetrator may well have taken himself out of the course of his employment and injuries he may have sustained arising therefrom will not be compensable.

Applying these principles to the election available to workers under s.8(1), a tortfeasor would not, in the normal course, be able to have the option of suing or claiming benefits because his conduct would have taken him out of the course of his employment. An innocent victim of an assault, however, would be able to choose between a lawsuit and a compensation claim. This, we suggest, is a reasonable conclusion.

To adopt the principle suggested by the applicant would, in our submission, exempt from compensation under s.3(1) a much broader class of individuals than was intended by the framers of the legislation. s.3(1) makes employers liable to pay compensation where the accident arises out of or in the course of employment

"except where the injury:

(a) does not disable the worker beyond the day of accident from earning full wages at the work at which he was employed; or

(b) is attributable solely to the serious and wilful misconduct of the worker unless the injury results in death or serious disablement."

The legislature has defined certain limits to entitlement to compensation. "Arising out of and in the course of" makes it necessary for the accident or disablement to be work-related. However, in considering whether a worker's conduct has disentitled him to benefits, the test is "serious and wilful misconduct".

Thus, if the worker can establish that he was performing his duties when the incident occurred and that what he was doing was not serious or wilful misconduct, he has established entitlement to benefits, or, in the appropriate case, has the option of claiming benefits or suing a third party.

The cases referred to by Mr. Manella do not appear to refer to legislation which includes the "serious and wilful misconduct" exemption. They deal with legislation which has not attempted to define the nature of the worker's conduct which would establish disentitlement to benefits.

The Board's policy is consistent with our position. The Board's Adjudication Branch Manual contains guidelines on entitlement to benefits where fighting or horseplay are involved. Innocent victims in either situation may elect under s.8(1) of the Act. This Tribunal has concurred with the Board's position with respect to a bystander victim of horseplay. See Decision #4.

We therefore conclude that, regardless of whether Mr. Beltrano's conduct took him outside the course of his employment, there is no doubt that Mr. Moynihan was in the course of his employment when he was assaulted. We therefore conclude that the accident arose out of and in the course of employment and Mr. Moynihan could quite properly elect to receive benefits. The employer, accordingly, could quite properly commence a subrogated claim.

We do not wish to leave this matter without voicing some concern about the reasons for this particular s.15 application. Although it would appear that the applicant was within his legal rights to bring this application, we question the appropriateness of an application which does not attempt to determine the right to sue or recover, but simply seeks to change the character of the lawsuit by removing the party with the subrogated claim. An additional consequence of this type of application is that the applicant, who in this case is a co-worker and perpetrator of the assault, can challenge the worker-victim's right to have claimed benefits under s.3 of the Act. What would normally and properly be an employer's right of appeal becomes the co-worker's right. We view this as somewhat of a distortion of the overriding intention of the legislation and we would hope that other potential litigants are dissuaded from such applications.

THE DECISION

The application is dismissed.

Dated at Toronto this 20th day of March, 1986

Signed: J. Thomas, D. Jago, S. Fox

WCAT No. 6085
Provincial Court No. C19727

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 83

IN THE MATTER OF an action commenced
in the Provincial Court (Civil Division)

AND IN THE MATTER OF an application
pursuant to Section 15 of the Workers'
Compensation Act.

B E T W E E N:

BELTRANO

App

- and -

MOYNIHAN

Res

WORKERS' COMPENSATION ACT
SECTION 15 APPLICATION

Workers' Compensation Appeals Tribunal

DECISION NO. 85

Tribunal d'appel des accidents du travail



Panel Chairman: N.A. Catton

Member: S. Fox

Member: M. Meslin

LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

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WORKER'S COMPENSATION APPEALS TRIBUNAL

DECISION NO. 85

THE APPEAL PROCEDURE:

The worker appeals the decision dated April 26, 1985, of Mr. D.R. Queen, Appeals Adjudicator.

The appeal was heard on February 24, 1986 by a Panel of the Tribunal consisting of N. Catton, Panel Chairman, S. Fox, a Tribunal member representative of workers and M. Meslin, a Tribunal member representative of employers.

The worker appeared and was represented by R. Tait, a staff member of the Office of the Worker Adviser. The employer was notified of the hearing but chose not to participate. The Panel was assisted by J. Siegel, of the Tribunal Counsel Office.

The Panel heard and considered oral evidence, given under oath, by the worker. It also read the recital of the facts contained in the Case Description, prepared by the Tribunal Counsel Office and agreed to by the worker. The memoranda and reports attached to the Case Description were also considered.

THE ISSUE AND HOW IT ARISES:

The worker has suffered at least three dislocations of his right shoulder. In 1980 and 1981 he was involved in non-work related accidents when his right shoulder dislocated. The last dislocation occurred on June 24, 1983, during the course of his employment, when he threw a 50 pound mattress on to the top of a seven foot high pile of mattresses.

The same day, he was taken to the hospital and was treated by Dr. J. Rathbun. Because this was the third dislocation, the doctor and the worker agreed that surgery would be of benefit to prevent a further recurrence. Surgery was scheduled and carried out on September 6, 1983.

The worker claimed and received workers' compensation benefits for one week following the accident. He requested but was denied benefits for the surgery and the period of time required for recuperation.

The worker is therefore requesting the Tribunal to decide whether he is entitled to benefits for the surgery and period of layoff resulting from the surgery.

To consider this case the Panel is required to determine whether the surgery would have been undertaken, even if there had not been an accident at work. If the sole reason for the surgery was to correct an underlying non-compensable condition, the worker will not be entitled to benefits. If, on the other hand, the injury suffered on June 24, 1983 contributed to the need for the surgery which was required at that time, the worker would be entitled to benefits.

THE PANEL'S REASONING:

The Panel considered all of the evidence including the worker's testimony, the medical reports, the submissions made at the hearing and the reasons contained in the Appeals Adjudicator's Decision.

There is no doubt that the worker suffered an accident at work which resulted in a right shoulder dislocation. He is therefore entitled to workers' compensation benefits for the treatment and absence from work resulting from the dislocation.

In respect to additional compensable lost time the Adjudicator concluded that the worker "had either returned to his pre-accident level of disability by the time surgery was performed or would have in the immediate future". His decision was based on the opinion of the Board's Surgical Consultant who indicated that the worker should not have been disabled for more than three weeks because of the shoulder dislocation which occurred at work and that the surgery was not causally related to the work accident. The Adjudicator therefore denied the worker entitlement to benefits during his lay-off resulting from the surgery.

The worker's representative provided the Panel with a medical report from Dr. R. Peter Welsh, an orthopaedic surgeon. The relevant portion of Dr. Welsh' opinion is contained in the following passage:

"On review, it is my opinion that (the worker's) shoulder was satisfactorily stable at the time he was hired by the (employer), that his shoulder was secure until he sustained a traumatic episode on June 24, 1983 when the shoulder was traumatically dislocated. Had he not been engaged in that type of work, had he not sustained a trauma, then his shoulder would not have been dislocated and he would not have had to undertake the surgical treatment."

The Panel also considered the worker's representative's submissions on the Board's guidelines concerning the adjudication of claims involving pre-existing conditions (Document 33 02 20, Claims Adjudication Branch Procedures Manual). Item 8, under the heading General Information, indicates that some claims may be allowed for a "once only repair" as in the case of a recurrent shoulder dislocation. Ms. Tait argued that this guideline was applicable to the case before the Panel and if applied would result in the allowance of the appeal.

Ms. Tait also submitted, in the alternative, that Section 23 of the Act, as it read prior to April 1985, may be applicable in this case. Section 23 provides for payment for special medical treatment by the Board in certain circumstances, to avoid long term costs to the accident fund.

The Panel placed great weight on the opinion of Dr. Welsh in assessing the worker's claim because that opinion dealt in depth with the worker's medical history and treatment and carefully examined the period during which the worker was in fact disabled. Dr. Welsh is an orthopaedic surgeon, who has conducted research and written about the treatment of shoulder dislocations.

In the Panel's view the relevant facts are that the worker did sustain a trauma to his right shoulder at work and surgery was scheduled immediately after the accident. There is no evidence to suggest that the surgery would have been performed if the accident had not happened. These facts together with the opinion of Dr. Welsh have persuaded the Panel that the worker's claim should be allowed. This opinion is bolstered by the Board's own guidelines which also suggest that this claim may have been properly granted at the level of initial adjudication.

In our opinion, it is not necessary to deal with the submission concerning Section 23 and we will not comment on this argument.

For the reasons identified, the Panel is of the opinion that there was a relationship between the surgery and the work-related accident and the worker is entitled to benefits.

The Panel also considered the duration of benefits and has found that the worker is reasonably entitled to temporary total benefits from August 17, 1983 until December 8, 1983. In the Panel's opinion the worker's absence from work, during this period, is primarily related to the surgery which flowed from the accident at work.

DECISION:

The appeal is allowed. The WCB is directed to pay the worker temporary total compensation benefits from August 17, 1983 until December 8, 1983 and any related medical aid benefits.

DATED at Toronto, Ontario this 19th day of March, 1986.

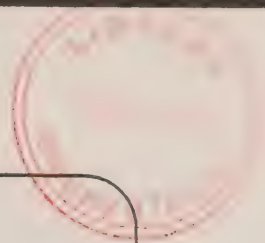
SIGNED: N.A. Catton, S. Fox, M. Meslin



Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

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DECISION NO. 86

Panel Chairman: I. Strachan

Member: J. Connor

Member: N. McCombie

June 1986

RESEARCH AND PUBLICATIONS DEPARTMENT

Workers' Compensation Appeals Tribunal

505 University Avenue, 7th Floor, Toronto, Ontario M5G 1X4
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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 86

THE APPEAL PROCEDURE

This application is made pursuant to section 15 of the Workers' Compensation Act, by the Defendants Swadron, Brown, Cascone & Himel and Gordon Fulton. The application arises from Action No. 202538/83, in which Plaintiff Calvin Clarke seeks damages based upon negligence and breach of contract. In a separate action, (No. 211310/83), the Plaintiff alleges that the Workers' Compensation Board (the "Board") was negligent in failing to exercise its statutory right of action on his behalf and he claims damages from the Board.

The application was heard on February 28, 1986, by a Panel of the Appeals Tribunal consisting of I. Strachan, Panel Chairman, J. Connor, a member of the Tribunal representative of employers and N. McCombie, a member of the Tribunal representative of workers.

Since the action against the Applicants/Defendants and the action against the Board have been joined and will be heard together by the District Court, the Board was notified of this application and, with the consent of the parties, attended at the hearing to make submissions.

The Applicants/Defendants were represented by D. Lapowich of the law firm Koskie & Minsky.

The Board was represented by J. Bush of the law firm Blaney, McMurtry, Stapells, Aarons & Watson.

The Respondent/Plaintiff attended and was represented by P. Carlisi, from the law firm Kapelos & Carlisi.

D. Starkman the Tribunal's general counsel assisted the Panel.

The Panel heard and considered evidence given under oath by two witnesses, R. Darlow and J. Jensen. In addition, the Panel read the Defendant's factum (Exhibit #1), the Plaintiff's factum (Exhibit #2), briefs, case law and documents submitted by the parties. Submissions were made by Mr. Lapowich, Mr. Bush, Mr. Carlisi and Mr. Starkman.

THE ISSUES AND HOW THEY ARISE

On April 27, 1978, the Plaintiff Mr. Clarke was operating a motor vehicle on behalf of his employer when he was involved in a traffic accident. The other vehicle involved was driven by Mr. Darlow and registered in the name of Mr. Jensen. Mr. Jensen operated a cartage service under the name Jensen Truck Lease.

On May 19, 1978, Mr. Clarke signed an "Election to Claim" form provided by the Workers' Compensation Board. It is the Panel's understanding that this Election form is issued as a standard practice by the WCB, pursuant to section 8(4) of the Act, where there may be a right of action against a third party. The injured worker "elects" to claim benefits from the WCB and subrogates any right of action in favour of the Board.

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 86

IN THE MATTER OF an application pursuant to
Section 15 of the Workers' Compensation Act,
R.S.O. 1980, c. 539, as amended;

AND IN THE MATTER OF an action commenced in
District Court of Ontario at the City of
Toronto, as Action No. 202538/83.

B E T W E E N:

SWADRON, BROWN, CASCONI & HIMEL, AND
GORDON FULTON

Applicants in this application
and Defendants in the District
Court action.

- and -

CALVIN CLARKE

Respondents in this application
and Plaintiffs in the District
Court action.

In addition, the Plaintiff sought legal advice from Mr. Fulton, a lawyer with the law firm of Swadron, Brown, Cascone & Himel with respect to his right of action against Mr. Darlow and or Mr. Jensen. No action was commenced by the law firm.

Similarly no action was commenced by the WCB against Mr. Darlow and/or Mr. Jensen. Apparently it was the Board's opinion that the accident in question had arisen out of and in the course of the employment of both Mr. Clarke and Mr. Darlow and that each was the employee of a Schedule 1 employer. In these circumstances, section 8(9) of the Workers' Compensation Act states that there is no right of action.

It is the submission of Mr. Carlisi that Mr. Darlow was not an employee of Mr. Jensen, within the meaning of the Act and an action should have been brought by the Board, and/or Mr. Fulton on Mr. Clarke's behalf.

As no action had been brought within the two year limitation period prescribed by the Highway Traffic Act, Mr. Clarke undertook an action against the Defendants for failing to act in his interest.

Preliminary Issue: Jurisdiction

As a preliminary matter, Mr. Carlisi argued that neither of the Defendants is a "party to an action" as contemplated by section 15 of the Act and accordingly the Appeals Tribunal does not have the jurisdiction to make a ruling on this application.

Section 15 of the Act reads as follows:

Any party to an action may apply to the Appeals Tribunal for adjudication and determination of the question of the plaintiff's right to compensation under this Part, or as to whether the action is one the right to bring which is taken away by this Part, or whether the action is one in which the right to recover damages, contribution, or idemnity is limited by this Part, and such adjudication and determination is final and conclusive.

The Panel considered Mr. Calisi's submissions and reserved judgement on the jurisdiction issue. His request for an adjournment was denied since witnesses had been subpoenaed and were present to give evidence and the parties' rights would not be prejudiced by continuing the hearing.

Therefore the issues for determination are:

1. Insofar as the action is not against Mr. Darlow and Mr. Jensen for damages arising out of the accident, but rather against the Defendants for negligence, does the Tribunal have the jurisdiction under section 15 to make a determination on the application by the Defendant?
2. If the Tribunal does have jurisdiction, should the Panel;
 - (a) limit itself only to a finding of whether or not Mr. Darlow was an employee of a Schedule 1 employer at the time of the accident; or
 - (b) determine whether the Plaintiff's right of action has been taken away by the Workers' Compensation Act?

THE PANEL'S REASONING

Jurisdiction

With respect to Mr. Carlisi's preliminary motion on jurisdiction, the Panel concludes that the motion must be dismissed. The word "party" in section 15 is not restricted to workers and employers nor is the word "action" restricted only to those actions in which one of the parties is an employer or worker. Whether the Plaintiff's action is founded in negligence against the driver and owner of a motor vehicle or is founded in negligence against a solicitor, makes no difference. If an issue in the action is the question of the Plaintiff's "right to compensation under ... (the Act)", then any party may apply to this Tribunal for adjudication and determination of the question of the Plaintiff's right to compensation.

In the case before the Tribunal, if it can be shown that an action should have been brought by the Defendants on behalf of the Plaintiff and that, if it had been brought it must have succeeded, then the Plaintiff will succeed in recovering damages for the amount lost by the failure to bring the action originally. If on the other hand, it is made clear that the Plaintiff never had a cause of action, that there was not a case which the Plaintiff could reasonably ever have formulated, then it is plain that he cannot recover damages against the Defendants. If the Plaintiff cannot show damage, then he cannot succeed in an action against his solicitors for negligence in failing to serve the writ within the prescribed period of two years.

The Plaintiff's action is, in a sense, a derivative one. The success of his action against his solicitors can be no higher than his chance of success in the original potential action against Mr. Darlow and Mr. Jensen. If section 8 of the Act precluded an action against Mr. Darlow and Mr. Jensen, the existing negligence action derived from the Plaintiff's original "right" vis-a-vis Mr. Darlow and Mr. Jensen must fail. It would appear that, for the Plaintiff to succeed in this negligence action, he must demonstrate that the Plaintiff's right to compensation under the Act was not taken away by section 8. The Tribunal is the appropriate forum for making this determination and it does not lose jurisdiction simply because the existing Defendants become, in effect, substitutes for the original tortfeasors Darlow and Jensen.

SCOPE OF THE HEARING

In discussing the jurisdictional question referred to above, Mr. Lapowich indicated that he wasn't asking the Panel to determine whether Mr. Clarke's right of action was removed by the Act; he was only seeking a determination by the Tribunal on the employment status of Mr. Darlow.

Tribunal counsel also made submissions on this point, arguing that section 15 raised two questions:

- i) Does the Plaintiff have a right to compensation?
- ii) Has the Plaintiff's right of action been taken away by the Act?

It was Mr. Starkman's submission that, because these two questions are connected by the disjunctive "or", the Tribunal could be asked either, but not necessarily both questions.

The Panel is of the view that in order to answer the question posed by the parties, it must indeed make a determination on whether the Plaintiff's right of action has been taken away.

By ignoring the second part of section 15, the Panel would only have the authority to determine whether the Plaintiff has a right to compensation. As this question has not been disputed by any party and as no evidence was led on this point, the Panel would have nothing to determine.

To limit ourselves only to resolving the question of Mr. Darlow's employment status would be to answer a question not posed by the legislation. There is no authority within section 15 to answer only this question. In addition, a ruling on the employment status, without a concomitant ruling on the right of action, would be an abrogation of responsibility on the Panel's part and result in a patent absurdity. The only reason that the employment status is of any interest is because it bears directly on the Plaintiff's right of action.

It is therefore the finding of this Panel that the Tribunal has a responsibility in section 15 Applications to consider the section as a whole. The Tribunal will not be limited to questions raised by the parties. In the case before the Panel, a finding of fact on the employment status of Mr. Darlow will lead to a finding of law with respect to the Plaintiff's right of action.

THE EMPLOYMENT RELATIONSHIP:

Mr. Jensen's status as a Schedule 1 employer was not disputed. What was at issue was whether Mr. Darlow was an "employee" of Mr. Jensen, as defined by the Workers' Compensation Act. Section 1(1)(j)¹ of the Act defines "employee", in part, as:

...a person who has entered into or is employed under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise...

In arriving at a finding of fact on Mr. Darlow's employment status, the Panel considered the evidence in two parts;

1. Mr. Darlow's general "employment" status with Mr. Jensen; and,
2. His "employment" status at the time of the accident.

1. The General "Employment" Status:

In attempting to determine whether an employee/employer relationship exists, the Tribunal has attempted to determine whether Mr. Darlow was part of Mr. Jensen's business organization and whether his work was done as an integral part of the business. In applying this organization test, the Tribunal has considered a number of factors:

¹This refers to the section number in force at the time of the accident (RSO, 1970, as amended). The current section number is 1(1)(z), "worker".

1. Ownership of the equipment used in the business.
2. Evidence of co-ordination control as to "where" and "when" the "employee's" work is performed.
3. The form of compensation (ie. a fixed rate or variable remuneration with an attendant prospect of profit or risk of loss).
4. Intention of the parties.
5. Business or government records which reflect upon the status of the parties.

The evidence presented to the Panel included the testimony of both Mr. Darlow and Mr. Jensen, that, in their own minds, an employee/ employer relationship existed.

While Mr. Darlow had, in 1976, purchased a tractor from Mr. Jensen, evidence indicated that he only used this vehicle to further the Jensen business - namely the transport of goods for Dominion Stores. Mr. Jensen maintained the contract with Dominion, the necessary cartage licences and insurance coverages.

Mr. Darlow testified that, upon purchasing the tractor, an agreement was signed with Mr. Jensen. While that agreement was not available at the Hearing, both witnesses testified that it included an understanding that Mr. Darlow would only use the tractor to perform work for the Jensen business. Conversely, both witnesses stated that Mr. Darlow would also drive other vehicles on Mr. Jensen's behalf.

It would therefore appear that the purchase of the tractor did not, in itself, remove Mr. Darlow from an employment relationship with Mr. Jensen. Rather, it can be seen in much the same way as a carpenter purchasing his own tools to perform the work of his employer.

The Panel also took note of a document submitted by Mr. Lapowich in his brief. This was an "Employer's Statement of Payroll" form, issued by the Workers' Compensation Board on January 30, 1978, to Jensen Truck Lease. That form, signed by Mr. Jensen for the purpose of covering his employees under the Workers' Compensation Act, contains a heading titled "Contractors and Sub-Contractors who are considered by the Board to be your employees...". Included in the list of typed names is that of Mr. Darlow.

Mr. Jensen, however, testified that he personally would not have entered these names. The form was prepared by his book-keeper for his signature. It was Mr. Carlisi's submission that the form should therefore be disregarded as evidence of an employment relationship.

The Panel is of the view, that, as the book-keeper was retained under the direction of Mr. Jensen, he must have received the information directly or indirectly from Mr. Jensen. Since Mr. Jensen did sign the form, then some weight must be attached to it in establishing Mr. Darlow's status at such time.

Mr. Jensen's testimony was adverse in interest as he was the the employer against whom the WCB costs had been transferred, pursuant to section 8(9).²

In summary, the Panel found that:

1. Mr. Darlow was performing duties only for Mr. Jensen;
2. While he had purchased his own vehicle, the nature of the purchase was such that the use of the vehicle was, in effect, controlled by Mr. Jensen and restricted to use in Mr. Jensen's business;
3. Mr. Darlow was paid a regular rate for his work, although such rate varied, depending upon whether he was using his own vehicle or not;
4. Both parties considered that an employment relationship existed;
5. Both Mr. Darlow and Mr. Jensen were credible witnesses who had no direct personal stake in the outcome of the Hearing.

In this case the Panel has concluded that Mr. Darlow was subject to the co-ordinational control of Mr. Jensen as to where and when he performed his work and also, to some extent, as to how he performed his work (ie. with his own tractor or another tractor owned by Jensen Truck Lease). The preponderance of evidence indicates that Mr. Darlow should be considered an "employee" of Mr. Jensen as defined in section 1(1)(j) of the Act as it then was, and not as an independent contractor.

2. Employment Status at the Time of the Accident:

Section 8(9) of the Act deals with the right of action against a Schedule 1 employer. That section reads as follows:

"No employer in Schedule 1 and no worker of an employer in Schedule 1 ... has a right of action for damages against any employer in Schedule 1 ... or any worker of such employer, for an injury for which benefits are payable under this Act, where the worker's of both employers were in the course of their employment at the time of the happening of the injury, but, in any case where the Board is satisfied that the accident giving rise to the injury was caused by the negligence of some other employer or employers in Schedule 1 or there workers, the Board may direct that the benefits awarded in any such case or a proportion of them shall be charged against a class or group to which such other employer or employers belong and to the accident cost record of such individual employer or employers".
(Emphasis added.)

²Section 8(9) provides, among other things, that the WCB may charge the costs of a claim to a second Schedule 1 employer if it is satisfied that the accident was caused by negligence. In this case, the costs were transferred from Mr. Clarke's employer, Union Felt, to Jensen Truck Lease.

It is not sufficient that Mr. Darlow be found, in general, to be an "employee" of Mr. Jensen. It must also be established that "the workers of both employers were in the course of their employment at the time of the happening of the injury". There was no dispute that the Plaintiff was in the course of his employment at the time. It remains to be determined whether Mr. Darlow was in the course of his employment when the accident occurred.

It was the testimony of Mr. Darlow that he was en route to a truck dealer to get an estimate for the painting of one of Mr. Jensen's trucks when the accident occurred. He testified that he had finished his normal duties of transporting goods and was asked to deliver the truck. He stated that this was not unusual and that he had performed such maintenance functions in the past. He also testified that he would have been paid a standard hourly rate for performing this function, although it would be a different rate than that which he received while driving his own truck.

Mr. Jensen basically corroborated this evidence in his testimony, although he couldn't remember whose truck was being delivered and for exactly what purpose.

The Panel considered the submissions by Mr. Carlisi on this point. It was his view that Mr. Darlow's testimony had indicated that his general agreement with Mr. Jensen was to "haul freight" and that the delivery of the truck took place after Mr. Darlow had completed his duties for that day. The delivery of the truck was characterized as a personal favour to Mr. Jensen falling outside the scope of Mr. Darlow's normal duties and therefore removing him from the course of employment.

It is the Panel's finding that, while the specific agreement was to haul freight, the upkeep and maintenance of equipment was clearly incidental to that end. In addition, Mr. Darlow stated that he had in the past done mechanical repairs and painting on the Jensen trucks. Mr. Darlow was in no way pursuing an objective unrelated to his employment and in fact was being paid for his efforts at one of his two normal rates. While this rate of pay may have been different than his rate while driving his own truck, that has no bearing on his employment status. If a worker, for example, is injured while receiving overtime pay or shift differential, that circumstances would not remove that worker from the course of employment.

While Mr. Carlisi was of the view that the delivery of the truck was a "personal favour" and Mr. Darlow was not subject to discipline for refusing to do so, the Panel finds that this would constitute a far too narrow definition of "course of employment". To again use the analogy of overtime, many workers voluntarily undertake to work beyond their normal hours as a "favour" - albeit a paid one - to their employers. Such voluntary overtime should not be taken as removing them from the course of their employment.

It is the Panel's finding that Mr. Darlow was in the course of his employment at the time that the accident occurred.

THE DECISION

The Panel concludes:

1. The Appeals Tribunal has the authority to determine this application under section 15 of the Act;
2. At the time of the accident, both Mr. Clarke and Mr. Darlow were employees of Schedule 1 employers;
3. Mr. Clarke's right of action against Mr. Darlow and Mr. Jenson has been taken away by section 8(9) of the Workers' Compensation Act.

DATED at Toronto this 24th day of June, 1986.

SIGNED: I. Strachan, N. McCombie, J. Connor.

WCAT No. 0671
District Court No. 228040/84

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 86

IN THE MATTER OF an application
pursuant to Section 15 of the Workers'
Compensation Act;

AND IN THE MATTER OF an action
commenced in District Court of Ontario
at the City of Toronto as Action No.
202538/83.

B E T W E E N:

SWADRON, BROWN, CASCONI & HIMEL AND
GORDON FULTON

Applicants

- and -

CALVIN CLARKE

Respondents

WORKERS' COMPENSATION ACT
SECTION 15 APPLICATION

CASON
L95
- D21

Workers' Compensation Appeals Tribunal

Decision No. 88

Tribunal d'appel des accidents du travail

Panel Chairman: A. Signoroni

Member: D. Jago

Member: B. Cook



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 88

THE APPEAL PROCEDURE:

The worker appeals the June 6th, 1985, decision of the Workers' Compensation Appeals Adjudicator, F.H. Kaliciak, which affirmed a Claims Review Branch decision dated December 6th, 1983.

The appeal was heard on February 28th, 1986, by a Panel of the Appeals Tribunal consisting of A. Signoroni, Panel Chairman, D. Jago, a member representative of employers and B. Cook, a member representative of workers.

The worker appeared without representation. The employer is a limited company and appeared in the person of its President. For convenience he will be referred to as the "employer" in this decision. The employer was assisted in his presentation by Mr. Krasic, the employer's accountant.

The Panel was assisted by its counsel, E. Newman, a member of the Tribunal's Counsel Office.

Although the worker testified in the English language, Mrs. Heidelmeyer, an interpreter knowledgeable in the Czech language, assisted the worker from time to time.

The Panel heard and considered the testimony under oath of the worker, of the employer and of the employer's accountant and read and considered the WCB file in its entirety. The Panel also read the Case Description recital of facts prepared by the Tribunal's Counsel Office and agreed to by the parties.

Oral submissions were made by the worker, by the employer's representative and by the Tribunal's counsel.

THE ISSUE AND HOW IT ARISES:

The worker claims to be entitled to compensation benefits for the period from December 6th, 1982, to the end of March, 1983, less the time worked.

His claim arises out of work he was doing as a bricklayer in December, 1982.

The worker testified that either on December 6th, 1982, or the next day, he was working alongside the employer when the latter swept some loose particles from the bricks and these particles entered his right eye. The worker further testified that the bricks used at the time were of poor quality. They had too much fine sand in their content and it was this sand that created the problem in issue. According to the worker's testimony the problem was immediately discussed with the employer as he was his immediate supervisor.

The employer contests the claim because, according to his records, the worker did not report to work on December 6th, 1982. In any event, the employer testified that even if the incident occurred on the following day, the worker did not talk to him about the problem until the middle of January, 1983. According to the employer's testimony this delay was unexplicable particularly in light of the fact that the worker, irrespective of the incident, continued to work with him until December 21, 1982.

Throughout the hearing, considerable time was devoted by both parties to the time cards and the corresponding cheques issued to the worker. It was confirmed that these records were prepared by the employer and not by the accountant.

The evidence established that the worker was paid \$13.00 per hour. Even though both parties agreed that the total number of hours during the two week period from November 29th, 1982, to December 15th, 1982, was approximately correct, the worker testified that the daily allocation of hours as shown on the relevant time card was inaccurate. The reason, he stated, was that he did not work during that time of the year for more than five to six hours daily, not eight and a half hours some days as shown on the time card.

Although the employer confirmed having completed the time card at the end of each day, he was unable to explain a number of discrepancies.

In the first place, he could not account for the sum paid to the worker to cover the period under consideration based upon the number of hours reported, the hourly rate and the deductions taken.

Secondly, he could not explain what kind of payment the worker received for the period from December 13th, 1982, to December 21st, 1982, the last working day of the worker.

It should be noted that the employer was unable to explain the problems raised even though both he and his accountant thoroughly examined the payroll ledger.

The medical evidence was not commented on at great length by the worker and it was dealt with only briefly by the employer even though both parties were made aware of the difficult medical issues to be resolved in the event that the incident was found to be work related.

In addition to the emergency report of December 9th, 1982, there are several medical reports from various specialists in the field of ophthalmology in the file.

The emergency report from the Queensway General Hospital shows that the worker was seen on December 9th, 1982, with complaints of a painful right eye and difficulty with blurred vision. It is recorded that he also complained of a foreign body sensation in the right eye. However, there was nothing in his eye that could be seen upon examination. The diagnosis was "right eye irritation".

It was noted that the report does not talk about any incident at work and indicates that the onset of pain occurred two weeks earlier. In his testimony, the worker confirmed that he was pain free until the date of the work incident, that he had said so and that the incident at work was mentioned but he was likely misunderstood because of his linguistic difficulties.

On December 10th, 1982, the worker was treated by Dr. D.W. Harper regarding his right eye irritation. His report indicates that the right eye presented a corneal scar and the symptoms of a disease known as punctate keratopathy.

The cornea is the round transparent tissue in front of the eyeball. A punctate keratopathy is a form of corneal inflammation marked by the formation of certain deposits on the posterior (back) surface of the cornea.

Benefits were allowed by the primary level of adjudication and in February 1983, a WCB doctor was asked to review this case. The report filed as Memo # 17 states : "extending the benefit of the doubt would consider that the punctate keratopathy is related to the initial incident. However, the worker was able to continue working until he was laid off by the employer. During this period, from the date of the initial injury to the date of the lay off, the worker had been followed by Dr. Harper but the findings were not acute enough to result in total disability. Regular follow up has continued but it would appear that the cornea has responded well by January 10th, 1983."

Based upon this recommendation, benefits were terminated as of January 10th, 1983. This decision was confirmed by a decision of the Claim Review Branch dated April 25th, 1983.

There is, however, evidence that the initial condition, as diagnosed, did not heal as soon as expected. On March 4th, 1983, the worker was seen by Dr. R.F. Daily. His report confirms that the worker had a corneal scar, as diagnosed by Dr. D.H. Harper, and blepharitis. Blepharitis is the term used for infection confined to the marginal parts of the eyelids. In its common form, this disease is usually due to bacterial rather than occupational origins. This view as to the nature of the disease is not in issue.

On March 18, 1983, the worker was examined by Dr. S.R. Frankling. His report reconfirms that punctate keratopathy was noted. Furthermore, his diagnosis makes reference to a corneal ulcer and to recurrent kerato conjunctivitis. A corneal ulcer manifests itself when the corneal tissue dies due to an invasion of micro-organisms following a trauma to the cornea. However, it can also occur as a complication of chronic blepharitis and conjunctivitis. A kerato conjunctivitis is an inflammation of the conjunctiva and the cornea. The conjunctiva is the mucous membrane which covers the front surface of the eyeball and the lining of the eyelids. This condition is often due to the reaction of the cornea and the conjunctival tissue to an internally produced toxin (poison).

In the opinion of Dr. S.R. Frankling, there could well be an association between the recurrent kerato conjunctivitis and the presence of mortar in the eye due to the incident claimed by the worker.

The worker's continuing problems generated other examinations from two specialists. The report from Dr. J.J. Kazdan, dated May 19th, 1983, indicates that in or about March, 1982, some type of tumor of the nose had been removed by surgery. After the operation the worker had infection localized in his eyes, nose and mouth. However, he was always able to work. The worker confirmed the facts as stated by Dr. J.J. Kazdan.

The report also indicates that the worker was suffering from a dry eye condition - low tear secretion - in both eyes. In his opinion, this condition was unlikely related to the previous trauma because both eyes were involved.

The final report to be considered is from Dr. B. Newbegin and is dated October 12, 1983. This report indicates that the worker had recurrent kerato conjunctivitis in the right eye which may or may not be associated with the December, 1982, work incident.

Further to an objection from the employer concerning the original allowance of the worker's claim, the Claims Review Branch reconsidered the case and in a decision dated December 6th, 1983, it was concluded that there was insufficient evidence to show that the worker sustained an injury at work as claimed.

A similar conclusion was reached by the WCB Appeals Adjudicator in a decision dated June 6th, 1985.

In his submissions, the worker stressed that he was not involved in another incident after the one in issue. Likewise, he confirmed that while at home in his apartment he did not come into contact with anything which could have hurt his eyes. Finally, he stated that as of the end of March, he resumed his work as a bricklayer with a different employer.

The issue, therefore, is whether there was a work related incident on or about December 6th, 1982, and, if so, whether the worker was disabled as a result of this injury.

PANEL'S REASONING:

In this case the evidence introduced by the parties is contradictory. To the extent that there are inconsistencies, the Panel accepts as more probable the facts testified by the worker.

Even though the worker's testimony was not fully consistent, most ambiguities could be explained by his language deficiencies. On the other hand, the testimony offered by the employer was either inaccurate or unsupported by the evidence. Specifically, the employer was unable to substantiate his submission that the worker did not work on December 6th, 1982.

On those considerations, the Panel finds that the worker suffered an accident to his right eye on December 6th, 1982. This accident was immediately reported to the employer even though not very formally.

There is some consensus that the blepharitis was not work related and the Panel accepts this view.

It is noted, that the dry eye condition involved both eyes. For this reason it is more probable than not that this condition did not result from the December, 1982, accident.

Even though there is some evidence indicating that the dry eye condition had been complicated by the accident of December, 1982, the Panel is of the view that the evidence was insufficient to establish that an aggravation of this condition resulted from the compensable accident.

It was suggested by Dr. S.R. Frankling that the kerato conjunctivitis may be associated with mortar in the eye due to the compensable accident. This evidence, however, does not elevate the chain of causation proposed from the realm of the possible to that of the probable. On the contrary, it is more probable than not that the dry eye condition made the worker prone to the diseases suffered.

By extending the benefit of the doubt to the worker, the WCB medical department recommended that the punctate keratopathy is related to the work incident. Although the same doctor also recommended that the cornea had responded well by January 10th, 1983, it is not clear on what evidence this recommendation was made.

For these reasons, the Panel is of the opinion that the punctate keratopathy in the right eye resulted from the accident of December, 1982.

The other diagnosed problems were not compensable as they were present in both eyes and on the evidence they pre-existed the accident of December, 1982.

However, these concurrent non-compensable problems in both eyes, caused the compensable disability that resulted from the punctate keratopathy to be more prolonged than would otherwise be the case.

DECISION:

1. The appeal is allowed.
2. The worker is found to have suffered a compensable accident on or about December 6, 1982.
3. The accident caused a condition diagnosed as punctate keratopathy of the right eye.
4. The worker had concurrent non-compensable problems in both eyes. These problems caused the compensable disability to be more prolonged than would otherwise be the case.
5. After the accident the worker did not work between December 21st, 1982, and the end of March, 1983, when he started to work with a different company.
6. Because of the Board's decision that there was no compensable accident, the Board has not had the opportunity to consider whether or not any compensable disability resulted from the accident and if so, for how long and whether it was total or partial and how it was affected by the concurrent non-compensable problems. The Hearing Panel has not had the benefit of hearing evidence that would allow it to make decisions on these issues. Accordingly, the Panel refers the case back to the WCB to determine the duration and the type of benefits payable to the worker on the facts as found.

DATED at Toronto this 25th day of March, 1986.

SIGNED: A. Signoroni, B. Cook, D. Jago

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Workers' Compensation Appeals Tribunal

DECISION NO. 91

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: F. Lankin

Member: K. Preston



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 91

IN THE MATTER OF an action pending in District Court of the City of Toronto, in the Judicial District of York;

AND IN THE MATTER OF an application pursuant to Section 15 of the Workers' Compensation Act, R.S.O. 1980, c. 539, as amended.

B E T W E E N:

GLEN CLARRY and GENERAL QUILTING CO. LTD.

Applicants in this application
and Defendants in the District
Court action.

- and -

MARGANI et al

Respondents in this application
and Plaintiffs in the District
Court action.

WORKERS' COMPENSATION APPEALS TRIBUNAL

S.15 APPLICATION

This s.15 application arises out of a lawsuit between the Plaintiffs, Tonino Margani and certain relatives of Mr. Margani and the Defendants, Glen Clarry and General Quilting Co. Ltd.

The application was heard on February 27, 1986 by a panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, F. Lankin, a member of the Tribunal representative of workers, and K. Preston, a member of the Tribunal representative of employers.

The application was brought by the Defendants who were represented by B. Dawe, solicitor. The Plaintiff, Mr. Tonino Margani, was present at the application and was represented by J. Gold, solicitor. Z. Onen from the Tribunal Counsel Office assisted the panel.

The panel heard and considered evidence given under oath by the Plaintiff, Mr. Tonino Margani, and by his brother, Mr. Roberto Margani, in oral testimony. The panel also read the factums provided by the Defendants and the Plaintiff, which factums were marked exhibits 1 and 2 respectively. Submissions were made by Mr. Dawe, Mr. Gold and Ms. Onen.

THE ISSUE AND HOW IT ARISES:

On August 31, 1982, the Plaintiff, Tonino Margani was involved in a motor vehicle accident on Dufferin Street south of Dupont Street in the City of Toronto. At the time of the accident Mr. Margani was driving a vehicle leased by Tonino Margani Holdings Limited. His brother, Roberto Margani, was a passenger in the vehicle. A truck which was involved in a collision with the Margani vehicle was driven by the Defendant, Glen Clarry, an employee of the Defendant, General Quilting Co. Ltd. Tonino Margani suffered injuries as a result of the accident and commenced a lawsuit against the Defendants. Relatives of Tonino Margani also sued the Defendants under provisions of the Family Law Reform Act.

At the commencement of the s.15 application, the parties agreed on a number of facts which substantially narrowed the issues on the application. In particular, it was agreed by the parties that at the time of the accident, the Defendant, Glen Clarry, was in the course of his employment with the Defendant, General Quilting Co. Ltd. It was agreed that General Quilting is and was at the material time a Schedule 1 employer. It was further agreed that Tonino Margani had elected under s.11 of the Worker's Compensation Act to be a worker for the purposes of the Act and was therefore deemed to be a worker of a Schedule 1 employer.

S.8(9) of the Act takes away the rights of Schedule 1 workers to sue other Schedule 1 workers or employers in certain circumstances:

"No employer in Schedule 1 and no worker of an employer in Schedule 1 or dependant of such worker has a right of action for damages against any employer in Schedule 1 or any executive officer or any director or any worker of such employer, for an injury for which benefits are payable under this Act, where the workers of both employers were in the course of their employment at the time of the happening of the injury, but, in any case where the Board is satisfied that the accident giving rise to the injury was caused by the negligence of some other employer or employers in Schedule 1 or their workers, the Board may direct that the benefits awarded in such case or a proportion of them shall be charged against the class or group to which such other employer or employers belong and to the accident cost record of such individual employer or employers."

In this case, the parties agreed that two Schedule 1 employers were involved, that the worker of the Defendant employer was in the course of his employment at the time of the accident, and that Tonino Margani was a worker of a Schedule 1 employer. The sole issue, therefore, is whether the Plaintiff, Tonino Margani was in the course of his employment when the accident occurred.

It was further agreed by the parties that this application would not address the rights of the related Plaintiffs to sue the Defendants under the provisions of the Family Law Reform Act.

At the time the accident occurred, Tonino Margani, through his company, Tonino Margani Holdings Ltd., owned three "Colour Your World Paint and Wallpaper" franchises, two of which were located at Bloor and Gladstone, and at Bathurst and Lawrence Streets. He was driving his brother, Roberto Margani, to the Bathurst and Lawrence store, which his brother managed, when the accident occurred, at approximately 10:00 a.m., on August 31, 1982.

During examination for discovery of Tonino Margani in July, 1985, he was questioned about his activities on August 31, 1982. He testified that he normally started a typical day at 6:15 a.m. and would work until about 10:00 p.m. He said he was working on August 31, 1982; that he left the house around 7:15 or 7:20 and started work at about 7:30. The transcript continued:

- Q. What time did the accident happen?
A. Somewhere in the first hours of the morning, ten, ten o'clock, ten to ten.
Q. Had you been to one of the stores by that stage?
A. My first store, that's where my base is, Bloor and Gladstone.
Q. All right, so you'd gone to Bloor and Gladstone and you'd work at that store?
A. Hmmmm.
Q. Is that yes?
A. Yes.
Q. All right, what time did you leave the store at Bloor and Gladstone?
A. Five minutes before the accident.
Q. All right and where were you going?

A. I was going to my Bathurst and Lawrence store and take my brother.

Q. You had your brother with you?

A. Correct.

Q. All right and why were you going to the Bathurst and Lawrence store?

A. He manages that store for me and we were making rounds, visits.

Q. So you were going back to work the Bathurst and Lawrence store as well?

A. Whatever, audit, whatever."

It was Mr. Dawe's submission, on behalf of the Defendants, that this testimony clearly established that Tonino Margani had started work earlier that morning, had gone to one of his stores, and was driving his brother/manager, in his company owned vehicle, to another store which he owned. All of these circumstances, according to Mr. Dawe, point unequivocally to an admission by Tonino Margani that he was in the course of his employment when the accident occurred.

Tonino Margani told the panel that, in August, 1982, he lived with his brother, Roberto Margani, and their family. The night before the accident occurred, his brother's wife said she needed to use their car the next day. She worked at a candy factory near the Bloor and Gladstone store. Because she was nervous about driving in rush-hour traffic, it was agreed that evening that the next day, Roberto Margani would drive his wife to the Bloor and Gladstone store and his wife would continue on to work with the car. Tonino Margani would pick up his brother at the Bloor and Gladstone store, they would have breakfast together, and Tonino Margani would then drive his brother to work at the Lawrence and Bathurst store, where Tonino Margani was intending to visit to do some paperwork.

Tonino Margani stated that on the day of the accident, he left his house at about 7:15 and got to the Bloor and Gladstone store sometime after 8. His brother had already arrived at the store. They proceeded to a nearby restaurant for breakfast, during which time they spoke to a few neighbours in the restaurant. They left the restaurant shortly before the accident and proceeded to drive up Dufferin Street to the Lawrence and Bathurst store.

Roberto Margani confirmed the arrangements which had been made the night before and told the panel that he left his house on the day of the accident shortly after 7:00 a.m., arriving at the Bloor and Gladstone store just before 8. He went into the store and talked to a few of the employees. When his brother arrived a few minutes later they proceeded to a nearby restaurant, had coffee and talked to some neighbours and friends before heading off to the Lawrence and Bathurst store. He indicated that his brother had not done any work before the accident occurred.

It was Mr. Gold's submission that the evidence given by Tonino Margani, and corroborated by his brother establishes the fact that Tonino Margani had not yet commenced work when the accident occurred. He was on his way to his employment, having stopped off at Bloor and Gladstone to pick up his brother, and therefore was not in the course of his employment when the accident occurred.

The narrow issue, then, before this panel is whether Tonino Margani had commenced work at the Bloor and Gladstone store before driving to the Lawrence and Bathurst store.

THE PANEL'S REASONING:

During the hearing of this application Tonino and Roberto Margani were questioned by Mr. Dawe, by Ms. Onen and by members of the panel.

When confronted by Mr. Dawe with what would appear to be substantial inconsistencies between his testimony on discovery and his oral evidence on this application, Mr. Margani explained that he had never been through legal proceedings before this and he had been nervous during his examination for discovery.

In light of the evidence given by Mr. Margani on his examination for discovery which would strongly indicate that he had commenced work at the Bloor and Gladstone store prior to driving to the next store, this panel has great difficulty accepting Mr. Margani's testimony before the Tribunal to the effect that he had not commenced work that morning. During his testimony on his examination for discovery, when he apparently had no idea that being in the course of employment when the accident occurred would affect his lawsuit, he stated that he had been at one of his stores before the accident occurred and that he and his brother were in the course of making their rounds.

His evidence on his examination for discovery, taken as a whole, leads us to conclude that, although it may have been unusual for Mr. Margani to have met his brother at the Bloor and Gladstone store, he clearly did some work at the Bloor and Gladstone store prior to departing with his brother for the Lawrence and Bathurst store. We reach this conclusion even though we are not prepared to amend the transcript as suggested by Mr. Dawe to alter one of Mr. Dawe's questions to read: "so you'd gone to the Bloor and Gladstone store and you'd worked at that store." However, even excluding that question and answer leaves a clear picture of a businessman who had gone to his usual place of business, had transacted business and had moved on with his brother to the next store. We do not feel that Mr. Margani has explained to our satisfaction why his testimony is now about a very different version of events on the morning of August 31, 1982. In the absence of such explanation we are driven to conclude that the only rational explanation for the version which Mr. Margani asks this panel to accept is that it would tend to take Mr. Margani out of the course of his employment when the accident occurred, thereby allowing him to maintain his lawsuit.

There is no dispute that Tonino Margani is and was a dedicated worker intent on developing his franchises. It is, therefore, very difficult to imagine that Tonino Margani would not at least pay a visit to the store and perform some management functions while at the store, even as cursory as greeting employees and inspecting the premises. In so doing, he would have started his work day and would, in our view, simply have been continuing it by driving one of his managers to another store.

THE DECISION:

The application is allowed. As between the Defendants and the Plaintiff, Tonino Margani, we hold that the Plaintiff's right to bring an action against said defendants has been taken away by the Worker's Compensation Act. It follows that the Plaintiff, Tonino Margani, may be entitled to benefits under the Worker's Compensation Act for injuries arising out of the motor vehicle accident which gave rise to the aforementioned lawsuit. We make no finding as to the rights of the other Plaintiffs to maintain their action against said Defendants.

DATED at Toronto this 1st day of April, 1986

SIGNED: J. Thomas, F. Lankin, K. Preston

WCAT No. 0667

District Court No. 228040/8

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 91

IN THE MATTER OF an action pending in
District Court of the City of Toronto
in the Judicial District of York;

AND IN THE MATTER OF an application
pursuant to Section 15 of the Worker's
Compensation Act.

B E T W E E N:

GLEN CLARRY and GENERAL QUILTING
CO. LTD.

Applicants

- and -

MARGANI et al

Respondent

WORKERS' COMPENSATION ACT
SECTION 15 APPLICATION

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Workers' Compensation Appeals Tribunal

DECISION NO. 92

Tribunal d'appel des accidents du travail

Panel Chairman: L. Bradbury

Member: L. Heard

Member: R. Apsey



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION #92

THE APPEAL PROCEDURE:

The worker appeals the September 19, 1980, decision of the Workers' Compensation Board Appeals Adjudicator, Mr. C.J. Wellman.

The hearing was held in Sudbury, Ontario, on February 24, 1986, and conducted before a Panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, R. Apsey, a Tribunal member representative of employers, and L. Heard, a Tribunal member representative of workers.

The worker appeared and was represented by Mr. R. Briggs. The employer was represented by Mr. L. Watkinson. The Panel was assisted by R. Nairn, of the Tribunal's Counsel Office.

The Panel heard and considered oral evidence, given under oath, by the worker. It also read the recital of the facts contained in the Case Description materials prepared by the Tribunal's Counsel Office and agreed to by the worker. The memoranda and reports attached to the Case Description were also considered.

THE ISSUE AND HOW IT ARISES:

The worker suffered two compensable accidents to his right shoulder. The first was on January 12, 1968, when he fell four feet to the ground from a truck he was unloading. The worker believed he had dislocated his right shoulder and sought medical attention. The diagnosis by Dr. G. Desmarais, on the date of the accident, was: "strained muscles right shoulder". WCB paid the worker compensation until January 22, 1968, when he returned to work.

The second accident occurred on February 28, 1969. The worker hurt his right shoulder again when he tripped over a plank at work. The worker believed he had dislocated his shoulder and sought medical attention. The diagnosis by Dr. J. Semogas was: "contusion and strain of the right shoulder". Compensation was paid for medical aid only until March 11, 1969. There was no lost time because the company put him on light work at the same pay rate from the date of the accident; therefore, there was no loss of earnings. The worker returned to his regular work on March 11, 1969.

The worker continued working. He testified that between March, 1969 and July, 1979 he missed some time from work because his right shoulder "popped out" on 5 or 6 occasions. On each occasion, the worker received money from the employer's insurance plan and did not claim compensation from WCB, although he testified that all the incidents except one were work related. In any case, the worker testified there were no specific accidents during those ten years.

The only medical report in the materials before the Panel with regard to the worker's right shoulder for the period from 1969 to 1979 is a report from Dr. T.H. Flaherty, an orthopaedic surgeon, dated June 27, 1972. Apparently, the worker was assessed by Dr. Flaherty after "complaining of recurrent dislocations of both shoulders". Dr. Flaherty did not find evidence of recurrent dislocations but related the worker's problems to a "congenital laxity" in both shoulders.

The worker's evidence was that he dislocated his right shoulder at home on October 7, 1978, when he fell down the basement stairs. He received benefits under the employer's insurance plan for this incident until October 16, 1978.

In May, 1979, the worker's family doctor referred him to Dr. K.A. McCluskey, an orthopaedic surgeon, because of his continuing problems with his right shoulder. The worker told Dr. McCluskey that he related his ongoing problems to his work accident in 1968.

On July 26, 1979, Dr. McCluskey performed a Putti-Platt repair on the worker's right shoulder.

The worker had meanwhile sustained a back injury at work on June 26, 1979. He received compensation from WCB and was off work due to his back until September 26, 1979.

The worker claims that he lost one day from work on May 28, 1979 as well as lost time for the period from September 26, 1979, until his return to work in January, 1980 as a result of the surgery to his right shoulder.

The issue for this Panel is one of causation. That is, did the 1968 or 1969 accident result in dislocation of the worker's right shoulder and the subsequent surgical repair in 1979. In reaching its decision, the Panel must consider whether the surgery would have been required even if there were no accidents at work. If the surgery was performed only to correct an underlying non-work related condition, the worker is not entitled to benefits. However, if the accidents in 1968 or 1969 contributed significantly to the need for surgery the worker is entitled to compensation for his lost time from work.

THE PANEL'S REASONING:

The Panel considered all the evidence, including the worker's testimony, the medical reports, and the submissions made at the hearing.

The Panel notes that there is no indication in the medical evidence before it, that the worker dislocated his right shoulder in the 1968 or 1969 work accidents. There is only one medical report from 1968 and it diagnoses strained muscles of the worker's right shoulder. The 1969 medical report gives a diagnosis of a contusion and sprain of the right shoulder. As well, X-rays taken at the time showed no abnormalities of the right shoulder. The worker's evidence was that, on both occasions, his right shoulder dislocation reduced itself prior to seeing the doctor.

The Panel had regard for the medical report of Dr. Flaherty written in 1972. Although the worker complained of recurrent dislocations of both shoulders, Dr. Flaherty was unable to dislocate either shoulder and felt that, in fact, the worker may have "some congenital laxity of the shoulder joints" which accounted for his problems.

The doctor outlined his reasons for concluding that the worker was not suffering recurrent dislocations which included:

1. a recurrent dislocation usually occurs after a very severe usually anterior, dislocation which requires anaesthetic to put back and then is inadequately mobilized for six weeks
2. usually, the second and third time a shoulder dislocates it also has to be reduced by a doctor but it gets progressively easier to reduce as the years pass, and
3. posterior dislocations are very rare at the worker's age group and recurrent posterior dislocations are even rarer.

Dr. Flaherty stated that congenital laxity was a far less serious condition and the extensive surgery involved in repairing recurrent dislocations was not indicated at that time.

The Panel finds that the indications of dislocations outlined by Dr. Flaherty did not exist at the time of the worker's 1968 or 1969 accidents.

The medical evidence from 1979 is also inconclusive with regard to establishing a link between the 1968 or 1969 accidents and the subsequent surgery. Although Dr. McCluskey's report of July 26, 1979, states that he performed a Putti-Platt repair for recurrent dislocations of the right shoulder, the doctor also notes that the worker recounted "numerous episodes" of shoulder problems in addition to his 1968 work accident.

The Panel relies on Dr. Flaherty's 1972 report which did not find evidence of dislocations but which noted congenital problems. As well, there is some evidence that the worker's problem with his right shoulder may have resulted from non-work related incidents, in particular, an injury to his right shoulder resulting from a fall at home approximately seven months prior to his surgery.

On the basis of the lack of medical evidence indicating shoulder dislocations in the 1968 and 1969 accidents, and lack of medical evidence linking the requirement for surgery in 1979 to these accidents, together with evidence of other non-work related injuries, the Panel is not satisfied that the surgery in 1979 resulted from the work related accidents in 1968 or 1969.

DECISION:

The appeal is denied. The worker is not entitled to further compensation for his right shoulder disability and surgery on July 26, 1979.

Dated at Toronto this 25th day of March, 1986.

Signed: L. Bradbury, L. Heard, R. Apsey

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Workers' Compensation Appeals Tribunal

DECISION NO. 95

Tribunal d'appel des accidents du travail

Panel Chairman: L. Bradbury

Member: R. Apsey

Member: L. Heard



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

May 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 95

THE APPEAL PROCEDURE

The worker appeals the decision of the Workers' Compensation Board Appeals Adjudicator, M.L. Crapper, dated September 4, 1985.

The appeal was heard on February 27, 1986, in Sudbury, Ontario by a Panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, R. Apsey, a member of the Tribunal representative of employers, and L. Heard, a member of the Tribunal representative of workers.

The worker appeared and was represented by Mr. Slouenwhite from the Office of the WCB Workers' Adviser. The employer received notice of the hearing but chose not to attend. G. Dee appeared on behalf of the Tribunal's Counsel Office.

The Panel heard and considered evidence under oath by the worker in oral testimony and read the relevant forms, memoranda, reports and medical reports extracted from the WCB file which were marked as Exhibit #1 at the hearing.

THE ISSUE AND HOW IT ARISES

There is no dispute in this case on the facts. The worker suffered a compensable injury when he dislocated his left shoulder in 1972 after falling seven feet from a loading ramp. He continued to suffer recurrences of the dislocation. As a result, the worker underwent twelve surgical operations on his shoulder, all of which failed. The last operation, in 1982, removed hardware from his shoulder, resulting in what is called a "flail" left arm. This means that his left arm hangs at his side and is almost completely useless; it is also six inches shorter than the right arm. In addition, there is no muscle left in the worker's left shoulder resulting in a marked and extreme contour change in his left shoulder area.

In December, 1982, the worker was awarded a 70% permanent disability pension for his left shoulder and arm disability, plus 15% for other disabilities including 10% for his psychiatric disability. He has been receiving this 85% permanent disability pension since his pension assessment in December, 1983.

In November, 1985, the worker began a grade 12 upgrading course and a real estate course at Canadore College, under the auspices of the WCB's Vocational Rehabilitation Division. The worker expects to complete the courses by November, 1986, when he hopes to find work as a real estate agent.

The worker's claim is under section 52 or section 54 of the Workers' Compensation Act. He is requesting that he be reimbursed by WCB for the cost of having his clothing tailor-made. The worker's evidence was that he is unable to buy clothing ready-made as a result of his shoulder and arm disabilities. He also testified that he requires the clothing in order to be properly dressed during his attendance at the College and, once he is working, he will be required to dress in a proper and professional style. The worker provided a letter from a tailor stating that the cost of his tailor-made clothing will be approximately 50% higher than the ready-made cost.

The Appeals Adjudicator denied entitlement for the worker's clothing costs for two reasons:

1. section 52 of the Act specifies a clothing allowance only in circumstances where a prosthesis is worn; and
2. the worker was not involved with the Vocational Rehabilitation Division at the time of the Appeals Adjudicator hearing and, therefore, the Adjudicator concluded that section 54 did not apply.

The issue before the Panel is whether the worker is entitled to his costs for tailor-made clothing.

THE PANEL'S REASONING

The Panel notes that all the reports on the record indicate that the worker suffers from a serious and substantial disability resulting from his work injury. Not only is his left arm shorter than his right arm, but also his left shoulder is substantially different from his right shoulder. In effect, the worker's whole left side is altered by his disability and this would be apparent when he goes out in public.

In addition, there was evidence before the Panel that the worker's physical handicap has resulted in understandable problems with anxiety and depression. These psychological problems appear to have improved over time, but given the circumstances of the case, appropriate clothing may be an important step in developing the worker's sense of self confidence and social acceptability.

The worker's representative argued that section 54 of the Act should be interpreted broadly and applied by the Panel in this case. Section 54 states:

"To aid in getting injured workers back to work and to assist in lessening or removing any handicap resulting from their injuries, the Board may take such measures and make such expenditures as it may deem necessary or expedient..."

The Board's policy and guidelines on vocational rehabilitation do not deal directly with the circumstances in this case. However, the Panel notes the Board's definition of rehabilitation, as follows:¹

"...it is the cultivation, restoration and conservation of human resources, assisting those who are handicapped by disease, disability, or social maladjustment to achieve a state of maximum well being."

This is a broad definition of rehabilitation. However, the Adjudicator decided that section 54 was not applicable because the worker was not active with the WCB's Vocational Rehabilitation Division in seeking any re-employment at the time of the

¹WCB Board Policies and Divisional Administrative Guidelines, Vocational Rehabilitation Division, Document Number 01-01-02.

Appeals Adjudicator's hearing. Since that hearing, the worker, who is unable to return to his former employment, has been involved with the WCB's Vocational Rehabilitation Division and has, with the WCB's approval enrolled in a re-training course that is suited to his disability. Thus, the provision of a clothing allowance while in attendance at the course would appear to be a measure that would aid in getting the worker back to work. The Panel concludes that a clothing allowance from the time the worker began the course is appropriate in the circumstances, and satisfies section 54.

However, the Panel is concerned that the clothing allowance should not be restricted to the period that the worker is attending the course. To so restrict the allowance is to apply a narrow definition of rehabilitation which is contrary to the Board's broad definition. The Board's definition can be summarized as assistance in restoring a handicapped worker's ability to function in the work force or elsewhere.

This worker is severely handicapped by his disability. He has taken steps to return to the work force in suitable work which does not require the use of his left arm. However, he is unable to wear ready-made clothes or even to have ready-made clothes altered because of the extent of his handicap. Part of his success in his chosen area of work will depend on how he feels about himself and how people respond to him. The Panel finds that it is important for the worker to be suitably dressed in order to lessen his handicap and to function properly. Thus, we conclude that the worker should continue to be provided with a clothing allowance in the future once his courses are completed.

This conclusion is also in keeping with section 54 of the Act since it will aid in lessening the worker's handicap which has resulted from his work injury.

Having decided that the worker's claim can be met under section 54 of the Act, the Panel does not make a finding on section 52 of the Act. We note, however, that section 52(2) defines medical aid and refers to "appliances" or "apparatus" which are "necessary". On the face of it, this wording suggests more mechanical or technical equipment than the subject of this appeal.

The worker was unable to provide receipts for his clothing expenses prior to 1985, but he was able to outline what clothing he requires on an annual basis. In addition to the increased cost of having his clothes tailor-made, the worker finds that his flail arm results in increased wear and tear on his clothes. The Panel directs that this extra wear and tear should be taken into account by the WCB when assessing the worker's clothing needs.

DECISION

The appeal is allowed. The worker is entitled to the difference between the cost of ready-made and tailor-made clothing from November, 1985, and ongoing, for the clothing he would wear in public, subject to prior authorization by the WCB. This includes the cost of any clothing bought prior to the start of the worker's upgrading course that was bought for purposes of the course.

DATED at Toronto this 29th day of May, 1986.

SIGNED: L. Bradbury, R. Apsey, L. Heard.

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Workers' Compensation Appeals Tribunal

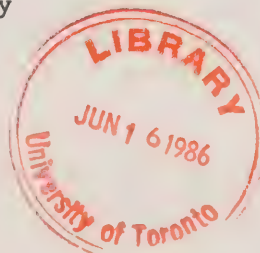
DECISION NO. 96

Tribunal d'appel des accidents du travail

Panel Chairman: L. Bradbury

Member: L. Heard

Member: R. Apsey



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

May 1986

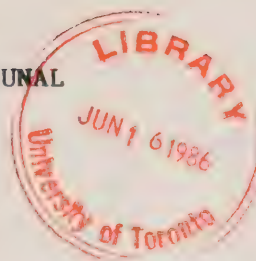
Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 96



THE APPEAL PROCEDURE

The worker appeals the decision of the Workers' Compensation Board Appeals Adjudicator, W.A. Paavola, dated April 11, 1985.

The Appeal was heard on February 24, 1986, and reconvened on February 27, 1986, in Sudbury, Ontario before a Panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, L. Heard, a member of the Tribunal representative of workers, and R. Apsey, a member of the Tribunal representative of employers.

The worker appeared and was represented by R. Briggs, a Welfare Officer with the Mine Mill and Smelter Workers Union. The employer was represented by L. Watkinson, Claims Director for the employer. G. Dee was present from the Tribunal's Counsel Office.

The Panel read and considered the Case Description Materials. Mr. Briggs also provided the Panel with a report from Dr. J. Chong when the Panel reconvened on February 27, 1986.

THE ISSUE AND HOW IT ARISES

The worker suffered a compensable work accident on November 3, 1971. On the date of the accident, the worker was a jackleg driller in an underground mine. He slipped and fell on a muck pile while holding a jackleg drill weighing about 100 pounds. The worker struck the tip of his right elbow on a rock and landed with his right elbow pinned under the drill. He also twisted his left ankle in the fall. The worker was carried above ground on a stretcher and received medical attention at the company's First Aid Station.

The worker received WCB compensation for medical aid only. The worker did not return to his regular work until one month later. During this month he was in "dry", the miners' change area, and received his full pay from the company.

The worker returned to work as a jackleg driller but testified that he had continuing pain in his left ankle and right elbow. His job as an underground driller was to scale, muck down, drill, and blast.

On October 18, 1977, the worker had an operation on his left ankle to remove a bone fragment. He was off work about one month and received money under the company's insurance plan.

The worker's right elbow became worse in August, 1983. On August 19, 1983, he laid-off work because of pain in his elbow. The worker received company insurance benefits for 52 weeks, at which time he applied to WCB for compensation.

On November 13, 1985, the worker returned to work as a scoop tram operator and has continued at this work until the present time.

The issue before the Panel is whether the worker is entitled to compensation for the following:

- (a) one month lost time in 1977 for his left ankle disability; and
- (b) lost time from August 19, 1983, until November 12, 1985, for his right elbow disability.

If it is established that these disabilities resulted from the compensable work accident on November 3, 1971, the worker is entitled to compensation for his lost time.

The worker is not precluded from claiming Workers' Compensation even though he received sickness and accident benefits under the company's insurance plan. If the worker is found to be entitled to Workers' Compensation, the insurance company would be reimbursed for the monies it paid to the worker.

THE PANEL'S REASONING

There is a significant delay between the 1977 lost time and the worker's claim to WCB. At the hearing, the worker gave evidence that it was not until a specialist saw him in 1983 that he understood he could make a claim to WCB for an old injury. When the specialist related his elbow disability to the 1971 accident and his work as a driller, the worker submitted claims to WCB for both his ankle and elbow disabilities which he felt arose out of his 1971 compensable accident. The Panel accepts the worker's explanation and finds that the delay is not unreasonable in the circumstances.

On the issue of entitlement, the Panel proposes to deal with each disability separately.

1. The left ankle:

An X-ray taken on November 4, 1971, one day following the work accident, showed:

"Four views of the ankle reveal an ossicle of bone adjacent to the tip of the medial malleolus. This is possibly a result of an old injury. It is smooth in outline and well corticated. There is no radiological evidence of any recent bony injury."

The worker testified that he did not receive medical attention for his ankle between 1971 and 1977, although he did have pain in the ankle during this period. The operation in 1977 on the left ankle removed a bone fragment from the medial malleolus. Dr. J. Wardill, who performed the operation, reported on September 23, 1977 that:

"It would seem that this (bone) fragment can articulate with the talus in certain positions and it is likely that this may be the source of his pain."

The Panel notes that the area where a bone fragment was revealed in the 1971 X-ray is the same area which was operated on in 1977. However, the original X-ray report from 1971 indicated that the bone fragment did not result from the recent work injury and may have been related to an old injury.

On the basis of the medical reports in 1971 and 1977, the Panel is not satisfied that the worker's left ankle disability in 1977 resulted from his 1971 work accident. It appears to the Panel that the bone fragment which was the site of the operation in 1977 existed at the time of the 1971 work accident; therefore, we conclude that the worker's lost time in 1977 did not result from the 1971 accident.

2. The right elbow:

The employer argued there were three reasons why the worker's right elbow disability in 1983 could not have resulted from his 1971 compensable work injury:

- (1) The worker had a pre-existing condition in his right elbow;
- (2) There were inconsistencies in and a delay in reporting; and
- (3) There was a lack of medical and other continuity between 1971 and 1983.

The Panel proposes to deal with each argument in order:

- (1) The WCB file material included a reference to an earlier right elbow problem in 1964. The only medical evidence relating to 1964 is a report from Dr. J.Y. Lafond, the worker's family doctor. His records included a reference to "cellulitis of the right elbow and also a fracture of the left 12th rib". The employer argued that the 1964 problem could be responsible for the worker's subsequent elbow problems.

At the hearing the worker gave evidence that he recalled breaking a rib playing broomball and that he might have had "water on the elbow" at the same time. He did not have further elbow problems until 1971.

The Panel accepts this evidence and concludes that the cellulitis in 1964 had resolved by 1971.

- (2) The initial accident reports of November 3, 1971, refer only to the left ankle. It is not until November 12, 1971, that the right elbow is mentioned in a radiological report which stated:

"The right elbow. The views of the elbow done in four projections reveal no fracture or other significant findings".

The doctor's certificate dated November 24, 1971, provided to the employer setting out a return to work date stated:

"Sprained left foot and ankle - injured right elbow".

Although the right elbow is not mentioned in the initial accident report, the Panel accepts the worker's evidence together with the medical reports noted above, and finds that the worker did injure his right elbow as well as his left ankle in the accident on November 3, 1971.

- (3) With regard to the right elbow condition, there are no medical reports on file from 1971 until August 23, 1983. An X-ray taken in August, 1983, indicated:

"... hypertrophic lippling at the medial margin ... no radiological evidence of any recent bony injury at or above this joint".

Dr. J.C. Wardill saw the worker on September 19, 1983, and reported to Dr. Lafond:

"This man has got pain and stiffness in his right elbow which he attributes to an injury some ten years ago. However, he has only been troubled for about the last three months or so having a loss of extension of his elbow in particular but pain when drilling".

The worker testified that, although he had pain in his elbow during the years when he worked as a driller, it was not until he performed heavier work in the East Mine area in 1983 that the pain became disabling. The worker stated that miners are in pain most of the time because the work they do is very heavy, but as a rule, they do not complain unless they suffer an injury.

The materials before the Panel included the report of a WCB investigator's interview with a co-worker, H. Charette, who worked in the East Mine with the worker in 1983. Mr. Charette confirmed that the work was very heavy and hard and required a lot of repetitive lifting and overhead work in the drift. Mr. Charette told the investigator that he let the worker do the "back-hole drilling" instead of the overhead work because of the worker's elbow problems. Mr. Charette said the worker often complained of elbow pain and the pain progressed until the worker was unable to continue at work.

There is a medical report dated July 13, 1984, from Dr. M.P. Yadav, an orthopaedic surgeon, to WCB which stated:

"I felt this (right elbow problem) was due to early osteoarthritis secondary to injury ... In my opinion he was capable of doing light work only. I did not feel he could pursue his occupation doing underground drilling".

On the question of the origin of the problem Dr. Yadav went on:

"He has a history of minor injury to his right elbow. It was treated as a sprain in the past. Since then he noticed his elbow could not be extended fully. He continued to have off and on pain but was able to carry on with his work. He now feels he cannot straighten it and has a permanent flexion of the right elbow".

The Panel was also provided with a report from Dr. J. Chong of the Ontario Worker's Health Centre dated February 22, 1986. In his assessment, Dr. Chong stated:

"This gentleman is suffering from degenerative osteoarthritis in the right elbow that is clearly related to work. A combination of factors have contributed to this degeneration of the joint. Initially he sustained a traumatic event in 1971 which did not result in any fracture. He continued to work at his jackleg drilling which involved repeated trauma through intense impact hand arm vibration from the jackleg drill. He would use the right hand to hold onto the drill or the leg depending on the position of the drill. This would result in the transmission of the intense impact from the hand to the elbow joint. The third factor that contributed was repetitive strain from the manual lifting and twisting involved in manipulating the drills and other types of heavy equipment underground. The accumulative strain on the joint over the twelve years from the initial date of the injury has resulted in the clinical picture that has left him unable to carry out his regular duties underground".

The Panel notes that the reports of both Dr. Yadav and Dr. Chong state that the worker is suffering from osteoarthritis secondary to injury. The only injury that the worker suffered to his right elbow was the 1971 compensable injury. The Panel accepts the medical reports of Dr. Yadav and Dr. Chong, together with the worker's evidence, supported by the WCB report of the co-worker's statement. We find that the 1971 right elbow accident, combined with the worker's occupation as a jackleg driller, caused the worker to lay-off work on August 19, 1983.

The question of causation is the only issue before the Panel; accordingly, the Panel makes no finding as to the appropriate type and level of compensation the worker is entitled to until his return to work in November, 1985.

DECISION

The appeal is allowed in part, as follows:

1. The Panel finds that the worker is not entitled to compensation for his lost time in 1977 due to his left ankle problem.
2. The Panel finds that the worker is entitled to compensation for his lost time resulting from his right elbow problem between August 19, 1983, and November 13, 1985, when he returned to work.

3. The Panel leaves to the WCB the determination of the amount of compensation the worker is entitled to for his right elbow.

DATED at Toronto this 15th day of April, 1986.

SIGNED: L. Bradbury, L. Heard, R. Apsey.

CA24N
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- D21

Workers' Compensation Appeals Tribunal

DECISION NO. 98

Tribunal d'appel des accidents du travail

Panel Chairman: L. Bradbury

Member: R. Apsey

Member: L. Heard



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 98

THE APPEAL PROCEDURE:

The worker appeals the decision of the Workers' Compensation Board Appeals Adjudicator Mr. M.C. Turner dated August 20, 1985.

The appeal was heard in Sudbury, Ontario on February 26, 1986, by a Panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, R. Apsey, a Tribunal member representative of employers, and L. Heard, Tribunal member representative of workers.

The worker appeared and was represented by M. Garceau from the Union of Injured Workers. The worker's wife appeared as a witness on behalf of the worker. The employer was advised of the hearing but chose not to attend. R. Nairn appeared on behalf of the Tribunal's Counsel Office.

The Panel and the worker were provided with copies of the Case Description Materials prepared by the Tribunal's Counsel Office. The worker's representative provided written submissions, as well as two medical reports from the worker's treating physicians.

THE ISSUE AND HOW IT ARISES:

The issue for this Panel is whether the worker continued to suffer a compensable disability after February 3, 1984. The Appeals Adjudicator denied entitlement on the basis that there was no medical evidence to establish temporary disability beyond that date.

The worker was employed as a truck driver and a labourer for a roofing company. On August 16, 1982, he was loading propane tanks weighing about 100 pounds each onto his truck when he felt a crack in his neck and back. He was taken to the local hospital by an OPP officer where Dr. P. Maskens diagnosed a "mechanical back injury".

The worker was unable to return to work. On the same day as the accident he saw his family doctor, Dr. Kusnierczyk. The Doctor diagnosed "acute cervical strain and acute lumbar strain with left sciatica".

The worker received temporary total compensation from WCB for the period from August 17, 1982, until February 3, 1984, when his compensation was terminated. The employer was given 50% relief under S.I.E.F. on the basis of the worker's pre-existing congenital problem in his cervical spine.

The worker continues to suffer pain in his back and left leg to the present time. He testified that he is unable to operate the clutch of his truck with his left foot. As a result, he has not returned to his former work as a truck driver and has lost his Class "A" licence. He has not worked since his accident.

The worker argued that he continues to be disabled and is entitled to compensation after February 3, 1984.

THE PANEL'S REASONING:

The worker's claim is under Section 39 or Section 41 of the Workers' Compensation Act then in effect. Section 39 of that Act provides that a worker is entitled to compensation if he is temporarily totally disabled, as long as the disability lasts. Section 41 provides that a worker who is temporarily partially disabled as the result of an accident is entitled to full compensation unless he or she fails to co-operate with a rehabilitation or medical program or fails to accept employment which is available and suitable.

The worker was 27 years old at the time of the accident. He had been a truck driver for 11 years prior to the accident. The worker suffers from dyslexia, and as a result, can neither read nor write. His evidence was that driving a truck was all he could do and all he ever wanted to do.

Until November, 1983, the medical reports agree that the worker's back problems were disabling. The reports can be summarized as follows:

1. Dr. J.C. Wardill, an orthopaedic specialist who treated the worker during the period, felt he suffered from a disc prolapse although this diagnosis was not confirmed by a myelogram. Dr. Wardill found that the worker's condition in September, 1983, was unchanged since the accident.
2. Dr. L. Teskey examined the worker at the WCB Hospital and Rehabilitation Centre in April, 1983. At that time, Dr. Teskey noted "I am sure that rehab is going to be required to assist this man back into the work force". On discharge in May, 1983, Dr. Teskey wrote: "still disabled; very limited motion of the low back" and he recommended rest at home.
3. On June 14, 1983, the worker was examined by a psychologist, Mr. S. Ross at HRC. He found the worker was "moderately depressed" and stated "... there is tremendous upset after having been told by the doctor that he may never be able to drive truck again".
4. The worker was examined by a WCB regional medical advisor, Dr. B.M. Wilson on September 1, 1983. His opinion was: "I believe this man has some organic problems in his low back ... in the meantime, he is probably unfit to do work on rough ground, repetitive use of his left leg, sitting or standing more than two hours and probably the operation of vehicles requiring the use of his left foot in their operation".

When asked to clarify whether the worker was totally or partially disabled Dr. Wilson wrote on October 6, 1983, that: "as far as his back is concerned he has a partial disability which is overshadowed by his non-compensable problems - dyslexia with illiteracy, poor interpersonal relationships, and poor dietary habits. Even if he can lose weight the other factors would still hinder him from being fully employable".

5. The worker's family doctor, Dr. Kusnierczyk reported to WCB up to November 25, 1983, that the worker was unable to do any work at all.

The Board's treatment of the worker changed after December, 1983, when it received a report from Dr. A.K. Mitra, dated December 22, 1983. Dr. Mitra is an orthopaedic surgeon who examined the worker on one occasion. His report was completely different from the reports to date. The doctor stated:

"I see no organic cause for his persistent symptoms. I believe he should lose a certain amount of weight, but whatever that may be he is quite capable of returning to his former work. He suffers from no permanent disability".

On the basis of this report, WCB terminated the worker's compensation as of February 3, 1984. Dr. Wilson's comment on Dr. Mitra's report was:

- "1. Agree no on-going entitlement in this claim as no longer disabled per Dr. Mitra's report.
2. On further review, psychiatric disability not evident, therefore no need to rule on entitlement for same".

The question for this Panel is whether the worker's disability continued after February 3, 1984. The Panel considered a number of medical reports on this point, as well as the evidence of the worker and his wife. The Panel found both the worker and his wife to be very straightforward and honest witnesses.

Two doctors who examined the worker after February 3, 1984, concluded that he had no residual organic disability. On the other hand, three other specialists found some organic basis for the worker's continuing complaints of pain in his left leg and back. In addition, two doctors noted that the worker was magnifying or exaggerating his physical problems.

The question of magnification or exaggeration of pain must be looked at in the context of this worker's overall condition. The evidence before the Panel indicates that the worker was upset or depressed because the condition of his back led to his loss of livelihood. This was noted in the HRC reports of Dr. Teskey and the psychologist, Mr. Ross. Also, according to the worker, neither his family doctor, nor Dr. Mitra would sign the medical form he required to keep his Class "A" licence. As a result, he lost his licence. The loss of his licence resulted in the worker being unable to do the only work he felt able to do.

The worker's wife testified as to his condition both prior to and after his accident. She testified that before his accident he was good natured and a hard worker. She stated that after the accident he complained constantly about pain and was irritable and depressed. His behaviour has affected her to the point where she is under a doctor's treatment for stress.

The Panel finds that the medical evidence together with the evidence of the worker and his wife indicates that the worker was partially disabled as a result of his organic problems combined with his psychological problems as a result of the accident on August 16, 1982.

The next question for this Panel is whether the worker is entitled to full benefits under Section 41(1)(b) of the Act. The section requires the worker to co-operate with rehabilitation and to accept work that is available and suitable in order to receive full compensation while temporarily partially disabled.

On the issue of rehabilitation, the worker's evidence is that he was never contacted by rehabilitation nor provided with any re-training or assistance of any kind. The Panel notes that as early as April, 1983, Dr. Teskey at the Board stated that the worker would require rehabilitation in order to return to the work force. The recommendation was noted in other Board memos but was never followed up. It is obvious to this Panel that a 27 year old man with dyslexia so severe that he cannot read a job application, would require rehabilitation given that his injury disabled him from pursuing his occupation. It causes us real concern that rehabilitation was not provided in this case. We are now faced with a 30 year old man who is unable to do his former work and who has been provided with no help at all in finding other suitable work.

On the issue of whether the worker was available for work which is suitable and available there are a number of factors to consider.

The worker's evidence was that his family doctor, who treated him from the time of the accident to the present, has continued to state his opinion that the worker is totally disabled. The worker testified that Dr. Kusnierczyk refused to give him a return to work slip because the doctor did not feel he could do even modified work. The worker testified that he did not want to go against his doctor's wishes. This evidence is supported by material in the WCB file. There is some indication that the doctor took this position on the basis that he did not want to be responsible if anything should happen to the worker, a position which has not assisted the worker in returning to some form of work. The worker testified further that when he asked the specialists about returning to work, he was told that it would be up to his family doctor to say what type of work he was able to do. The Panel accepts the worker's evidence on this point.

The worker testified that he registered at Canada Manpower. He was told that he would have difficulty finding work with a back problem and was told "don't call us, we'll call you".

The worker also contacted his accident employer. His employer told him that he could not consider taking him back without a return to work slip from his doctor but even with a slip, he would not consider hiring anyone with a back problem. As well, the worker testified that there is no such thing as modified work in roofing since it requires a lot of heavy lifting.

The worker impressed the Panel with his desire to do some kind of work within his limitations. The Panel is satisfied on the basis of the worker's learning disability and lack of retraining opportunities that there was not suitable work which was available to him after February 3, 1984, although the worker was available for work.

CONCLUSIONS:

The Panel makes the following findings:

1. Dr. Mitra's report of December 22, 1983, cannot be relied upon to find that the worker was not disabled after that time. The report contradicts all the medical evidence up to that point.

2. The medical and other evidence indicates that the worker was partially disabled after February 3, 1984, as a result of his disability which arose from the accident on August 16, 1982.
3. The worker is entitled to full compensation after February 3, 1984, because:
 - (a) No rehabilitation program was made available to him; therefore, it cannot be said he failed to co-operate with rehabilitation;
 - (b) The worker's family doctor advised him he could not perform even modified work; in addition, with his dyslexia and lack of retraining, there was no suitable work which was available to him; and
 - (c) The worker's efforts in registering at Canada Manpower and contacting his former employer satisfies the Panel that he was available for work during this period.

The Panel recommends that the worker be provided with rehabilitation assistance to help him find modified work suitable to his capabilities.

DECISION:

The worker is entitled to full compensation after February 3, 1984, for his disability which arose out of his accident on August 16, 1982.

DATED at Toronto this 15th day of April, 1986.

SIGNED: L. Bradbury, L. Heard, R. Apsey

CA24N
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- D 21

Workers' Compensation Appeals Tribunal

Decision No. 102

Tribunal d'appel des accidents du travail

Panel Chairman: L. Bradbury

Member: K. Preston

Member: S. Fox

LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION #102

THE APPEAL PROCEDURE:

The worker appeals the June 11, 1985, decision of the Workers Compensation Board Appeals Adjudicator, Mr. M.L. Crapper.

The appeal was heard on March 3, 1986, by a Panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, K. Preston, a member of the Tribunal representative of Employers and S. Fox, a member of the Tribunal representative of Workers.

The worker appeared and was represented by Mr. G. Nolis of the office of the WCB Workers' Adviser. The employer was not represented; it is no longer in business. The Tribunal was assisted by V. Mark, a member of the Tribunal's Counsel Office who appeared in the role of Tribunal Counsel.

The Panel heard and considered evidence given under oath by the worker in oral testimony and read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials.

It also read the Case Description recital of facts prepared by the Tribunal's Counsel Office and agreed to by the worker.

THE ISSUE AND HOW IT ARISES:

The worker's claim arises out of an accident which occurred at work on July 29, 1966.

On the day in question, the worker was cleaning the inside of a boat when an electric drill weighing about six pounds fell on his large left toe. The worker was wearing soft shoes at the time, as required by the employer.

The worker was taken immediately to the hospital by ambulance. He was treated by Dr. A.K. McKenzie who examined him and had X-rays taken. The X-rays showed: "no evidence of fracture or dislocation". The worker returned to work the following morning, although his toe was swollen and tender. He testified that he did not want to lose time from work because he was recently married and needed the money. The worker received workers' compensation benefits for medical aid only.

The worker's evidence was that he limped for approximately one year following the accident and his toe was intermittently sore and tender. His toe remained swollen and larger than the right toe from the date of the accident to the present time. There is a letter in the materials before the Panel from the worker's foreman who wrote to WCB stating that the worker limped noticeably for "a long time". Two fellow workers also sent letters to the WCB that they were aware of the accident and observed the worker working with "a very sore foot for several months".

The worker's evidence was that he suffered no further injury to the toe, either within or outside his employment. He stated further that he has never been involved in sports activities of any kind.

In 1970, the employer ceased operations in Canada and the worker held a series of jobs. In 1973, he began work with the City of Stratford and has remained there until the present time. For the first five years, he was assigned to garbage pick-up, which required a lot of walking. During this period, his toe became more painful. At his doctor's request, he was assigned work requiring less walking. He found that the pain subsided, but whenever he was required to do a lot of walking his toe condition flared up.

In 1982, the worker experienced increasing discomfort in his left toe. X-rays were taken and the findings were:

"There are a couple of separate fragments of bone around the medial aspect of the first interphalangeal joint. Osteoarthritic changes are also present at this level and these fragments of bone may have been fractured off a bony spur."

In 1984, the worker consulted an orthopaedic surgeon, Dr. R.J. Hill. Dr. Hill found: "On examination he has a palpable exostosis on the dorsal of the I.P. joint of the great toe and he has some painful crepitus of the I.P. joint." Dr. Hill recommended surgery to fuse the toe. The worker has delayed the recommended surgery pending a determination of his entitlement to WCB compensation for the surgery, including any lost time and medical aid expenses. His claim was denied by the Claims Review Branch in December, 1984. The worker appealed to the Appeals Adjudicator who denied entitlement on June 11, 1985. The Adjudicator accepted the opinions of the Board's Surgical Consultants and found there was no relationship between the 1966 accident and the worker's current problems with his toe.

At the hearing in March, 1986, the worker's representative submitted a medical report from Dr. C.I. Arciszewski, an orthopaedic surgeon, who examined the worker in December, 1985. Dr. Arciszewski agreed with Dr. Hill that the worker requires surgery.

The issue before the Panel, therefore, is whether the worker's need for surgery is causally related to the 1966 accident. If it is established that the surgery is required as a direct result of the earlier accident, the worker would be entitled to compensation for the surgery and any resulting lost time from work.

THE PANEL'S REASONING:

During the hearing, the worker was questioned by members of the Panel as well as by the Tribunal's Counsel. Submissions were made by the worker's representative.

The Panel found the worker to be straightforward and honest in his recital of the facts and in his response to questions. The Panel notes that the work accident in 1966, while not resulting in lost time, required immediate medical attention. The worker gave evidence that he limped for approximately one year and suffered ongoing pain and discomfort in his toe. This is supported by the letters from his foreman and his co-workers.

The condition of his great toe became acute in 1982. X-rays revealed arthritic changes in the great toe. This was the same area that was injured in 1966.

It appears to this Panel that the issue of a relationship between the 1966 accident and the worker's subsequent problems is a medical issue and, to determine it, the Panel must interpret the medical evidence before it.

Dr. Hill and Dr. Arciszewski, both orthopaedic specialists, examined the worker and gave their opinions on the relationship between the 1966 accident and the present condition of the worker's toe.

Dr. Hill stated:

"It is evident that this man suffered an injury to the interphalangeal joint of the toe which is now showing evidence of degenerative arthritis. In my opinion, this appears greater than ten years old and it is conceivable that it is due to his injury as described."

Dr. Arciszewski reported on December 2, 1985, that:

"I think it is absurd to say that this would not be the result of the 1966 accident. The bony spur he has has obviously been there a long time. He was never X-rayed originally up until 1982. The problem was already evident then. It is not uncommon to get a fracture through a bony spur, the fact is that the bony spur has arisen from a previous trauma, and with his story of dropping a heavy weight on the toe, it is very likely that he has developed degenerative changes as a result of this injury."

"Whilst one cannot be 100% sure that the previous injury caused this problem, it is very reasonable to suppose that it did..."

There are also two opinions from WCB doctors in the materials before the Panel.

A Surgical Consultant with WCB, gave his opinion in December, 1984, that:

"The injury described is not the type that would produce degenerative arthritis. Noting minimal nature of injury and 18 year interval, I would recommend denial."

Following the Appeals Adjudicator hearing, the matter was referred to the Medical Services Branch of the WCB. On June 3, 1985, the further opinion was:

"... X-rays in 1982 show separate fragments which Dr. Hill reports in 1984. These are suggested by the radiologist, Dr. O'Connor, as fractured off a bony spur. This would not be the result of the 1966 accident."

The two orthopaedic specialists who examined the worker gave us their opinion that the worker's present great toe problems requiring surgery are "conceivably" or "very reasonably" the result of his 1966 accident. The Panel accepts the opinions of the specialists in this case over the opinions of the Board doctors who did not examine the worker and who are not orthopaedic specialists.

The Panel concludes, therefore, that a relationship is established between the 1966 accident and the worker's present left great toe condition.

DECISION:

The appeal is allowed. The Panel finds that the worker's present left great toe problem requiring surgery resulted from his work accident in 1966.

DATED at Toronto this 25th day of March, 1986.

SIGNED: L. Bradbury, S. Fox, K. Preston



Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

CA24N
L95
- D21

DECISION NO. 110

Panel Chairman: R.E. Hartman

Member: B. Cook

Member: D. Mason



June 1986

RESEARCH AND PUBLICATIONS DEPARTMENT

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 110

THE APPEAL PROCEDURE

This is a worker appeal of the September 16, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, L. Carr. The Appeals Adjudicator affirmed a decision of the Claims Review Branch dated February 9, 1983. Both decisions denied entitlement for compensation beyond September 27, 1982, for an accident on September 10, 1981.

The appeal was heard on March 6, 1986, by a Panel of the Appeals Tribunal consisting of R.E. Hartman, Panel Chairman, B. Cook, a member of the Tribunal representative of employees, and D. Mason, a member of the Tribunal representative of employers.

The appellant worker was represented by M. Rodrigues, and R. Tait, both of the office of the Worker Adviser. The worker was present and gave testimony in Portuguese and this testimony was translated for the Tribunal by E. Bassani. No one was present from the Tribunal Counsel Office. The employer was neither present nor represented.

The Panel received and considered the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials, prepared by E. Grisolia of the Tribunal Counsel Office. The Panel also received and considered a letter from the worker's representative, Ms. Rodrigues, dated March 5, 1986, and its enclosures - a letter from the employer to the worker, published articles and a research paper dealing with accident neurosis. The Case Description Materials were entered as Exhibit #1 and the letter of March 5, 1986, and its enclosures were entered as Exhibit #2 to the proceedings.

At the commencement of the hearing, the worker's representatives advised the Panel that they had received only two weeks notice with respect to the hearing date. While the materials before the Panel dealt with disability, both organic and non-organic, it was the position of the worker's representatives that the Panel should only consider the issue of psychiatric or non-organic entitlement at this date with the worker reserving the option to bring the matter of the organic disability before a separate Panel on a later date.

The Panel expressed concern that in the material before it, the line between what was relevant to an organic or non-organic disability was so fine that any decision with respect to a non-organic disability could not but include assumptions or conclusions with respect to organic disability. It was suggested that if the worker's representatives wished more time to prepare the case for organic disability, this could be granted and then the issue of organic or non-organic disability could be dealt with at the same time. After considering the matter, the worker's representatives stated that they wished to proceed, without adjournment, to deal with the issue of disability, including organic and non-organic causes.

As stated, testimony was given by the worker and oral submissions were made by the worker's representatives.

THE ISSUES AND HOW THEY ARISE

The worker is claiming ongoing entitlement to compensation from September 27, 1982, to the present.

On September 10, 1981, while employed as a kitchen helper in a restaurant, the worker slipped on a greasy spot on the kitchen floor while carrying a large pan. She fell to her left, hitting her head on the corner of a convection oven. She received a cut above her left eyebrow and broke her glasses in the fall. She was taken to the Emergency Department of Doctors' Hospital and was diagnosed as having a "quite huge (4cm)" lacerated left eyebrow and a head concussion. An X-ray was taken with results being within normal limits. The laceration was sutured and the worker was referred to her family doctor for follow-up.

The worker was seen by her family doctor, Dr. Pinilla, on September 11. Dr. Pinilla also took X-rays and prescribed analgesics. He added a diagnosis of cervical spine strain.

The family doctor referred the worker to Dr. B.S. Sehmi, an orthopaedic surgeon. He examined the worker on October 5, 1981, and in his letter of the same date to Dr. Pinilla, he noted that the worker felt "tenderness in the neck with 30% range of motion with muscle spasm". The back was tender "with stiffness". There was no problem with straight-leg raising and no neurovascular deficit. He concluded that the worker had "strained her neck, and DL region in addition to the laceration in the left eye region which has pretty well healed". He suggested that she go to physiotherapy for the neck and back for about six to eight weeks and that "after that she should be able to go back to her work".

In Dr. Pinilla's report to the WCB dated December 18, 1981, he noted that "marked stiffness of the cervical spine along with spasm of cervical muscles" were delaying recovery.

The worker was seen again by Dr. Sehmi on February 3, 1982. He suggested the worker be admitted to the WCB Rehabilitation Centre as soon as possible, after noting the worker's "considerable anxiety associated with her symptoms" and "overreaction to examination".

On June 11, 1982, the worker was admitted to the WCB Rehabilitation Centre. While there, she continued to complain of difficulties with the left side of her face and her head as well as with her neck, left arm, left leg, and left foot. She complained her vision was not as good as it used to be prior to her accident and that she was often forgetful. She was seen by a neurologist, Dr. M. Hill, who concluded that she was "neurologically normal and the sensory finding is clearly non-organic, as is her failure to use the left limbs". Dr. Hill added that the worker was "totally incapacitated by what appears to be non-organic problems". The worker was discharged on June 22, 1982, with admission to Psycho-social Evaluation Module (PSEM) recommended. It was noted in the discharge summary that the worker's psychological outlook was "preventing any treatment from being effective" and that "further physiotherapy was pointless until her outlook improved".

On August 23, 1982, the worker was admitted into the PSEM at the WCB Rehabilitation Centre. The worker was examined by Dr. Yarrow, psychologist. Dr. Yarrow concluded as follows:

"In the absence of adequate physical findings, (the worker's) symptoms are suggestive of a conversion disorder. The accident itself was evidently traumatic for (her) but it seems that currently non-compensable factors are prolonging her disability. Notable among these are (her) having to act as a sole wage earner and the support which she receives from her husband at home. The social work reports suggests that (she) is quite dependent on her husband in that he usually spoke for her throughout that interview. Additionally, her presentation on medical examination and on interview also suggests some histrionic features. Interview provided no evidence of a memory disturbance."

On September 1, 1982, she was seen by Dr. McGonigal, orthopaedic specialist. Dr. McGonigal found "very little objective organic evidence to account for this patient's continuing exaggerated complaints of left-sided numbness, weakness and pain". He stated that his review of the X-rays revealed degenerative disc disease and early lumbar spondylosis at the L5/S1 disc level, but he added that "this is certainly not significant and in no way could it account for the severity of her symptoms".

On September 3, 1982, the worker was discharged from the Centre to return for psychiatric consultation on September 13. The report from the occupational therapist covering the period August 23 to September 14, 1982, stated that it had not been possible to assess (her) physical potential ... due to her extremely poor response". It was noted in the report that she complained frequently and refused to attempt most of the tests designed for assessment.

On September 13, 1982, she was examined by Dr. Jones, psychiatrist with PSEM. Dr. Jones reported that the worker denied being anxious and "did not relate symptoms suggestive of chronic anxiety". He felt that her description of physical symptoms did not suggest a psychophysiological component or depression. It was felt the symptomatology was "predominantly hysterical in origin". Dr. Jones did not feel that the worker's accident was "traumatic enough from a psychological point of view to have produced a post-traumatic neurosis" and felt that the "fact that the patient's husband has been on compensation for the last six years (had) some bearing on the overall situation in which the patient finds herself".

On September 15, 1982, Dr. Bodasing concluded in the discharge report that the worker had recovered from the physical injuries sustained in the accident and that he was ready to return to the workforce. No further treatment nor investigation was recommended. It was felt by PSEM that the worker was not suffering from a post-traumatic neurosis. It was noted that a social work assessment confirmed that the worker's husband was on compensation presently and that there were no marital or financial difficulties. The discharge diagnosis was cervical and lumbosacral strain and conversion hysteria. No treatment or rehabilitation was recommended. It was felt there would be no permanent disability and that there was no ongoing entitlement.

The WCB file indicates the WCB believed the worker was fit to return to regular work on Monday, September 27, 1982. The worker stated at the hearing that she had understood WCB to say that a job was waiting for her with her accident employer. There was some vagueness in her testimony with respect to the dates on which she returned to the accident employer and whether or not she attended for the purpose

of commencing work duties or to reapply. She recalled only that when she attended at the accident employer, co-workers laughed at her because she was not walking properly. The worker submitted a letter dated September 24, 1982, addressed to her by her accident employer thanking her for "reapplying for employment" and advising her that they did not have "a position to offer". In this connection, we note that the worker commenced employment with the accident employer on September 8, 1981, two days prior to the accident. The worker stated that she made no further attempts to return to any form of work after September of 1982.

Pursuant to the PSEM recommendation, the worker received no further compensation from WCB beyond September 27, 1982. The worker's appeal of this decision was denied by the Claims Review Branch on February 11, 1983. On February 24, 1983, this decision was appealed by the worker. Unfortunately, her representatives at that time did not request a date for an Appeals Adjudicator hearing until December, 1984, with the actual hearing being held on June 13, 1985.

The issue for the Panel is whether there is any entitlement from September 27, 1982, to the present, arising out of the accident of September 10, 1981.

THE PANEL'S REASONING

The medical evidence contained in the record, covering the period September 27, 1982, to the present, consisted of the following.

1. Four reports from Dr. Sehmi, the worker's orthopaedic surgeon, to Dr. Pinilla dated October 1, 1982, November 24, 1982, February 18, 1983 and October 30, 1984. These contain one or two small paragraphs to the effect that although the worker complained of pain, clinically there was nothing he could do for her. He suggested that she go to a psychiatrist of her choice.
2. A letter dated January 12, 1983, from Dr. M. Nunez, psychiatrist, indicating that the worker had been referred to him by Dr. Pinilla and that she refused to allow him to send a copy of his consultation report to the WCB. In a subsequent letter dated April 29, 1983, he noted that he examined her on that date and found her in "fairly good physical shape" with "a rather peculiar histrionic pity seeking attitude". He added:

"She was, as usual, complaining of numerous pains etc. that the medication she was taking did not help her. The husband was reinforcing her attitude and himself is as well on compensation after having an accident." ... "She was complaining and whining and describing her symptoms with details, being quite emphatic about it, criticizing people and symptoms of pain, etc. There was no evidence of any other psychopathology and her attitude and her condition appears to be similar to the ones she presented before." ... "I still believe that her histrionic and dramatic attitude and exaggeration of her symptoms is aimed to back her compensation claims. On the other hand she does not seem to be interested in any treatment program if this would be offered to her. She appears only interested in the compensation side of her condition."

A report dated August 8, 1983, to the family doctor from Dr. Allodi, psychiatrist, at the Toronto Western Hospital, who gave his conclusion as follows:

"Hysterical reaction in a compensation setting (ICD Code #300.1). The mechanism is entirely hysterical and superficial and it will not be too difficult to motivate this woman into changing her symptoms if she realizes that some progress in learning English and increasing the range of her working possibilities might get her some support from the W.C.B. ... Of course learning English is the first step towards making this woman more self-confident, independent and likely to be able to consider a light part-time job. When I have tested her motivation a little bit more, I may recommend that the W.C.B. support her in an English as a Second Language Course for three to five or six months duration."

The only follow-up letter from Dr. Allodi is a form letter dated December 12, 1983, to Dr. Pinilla, noting the worker had attended the Transcultural Psychiatric Services Clinic nine times, usually at two week intervals, and stating that her condition on discharge had "not changed". Valium and Entrophen were suggested as medication. The final diagnosis was hysterical reaction manifested by very dramatic limping associated with stresses of accident at work.

Memo #35, from Dr. C.V. Murray, a WCB psychiatric consultant, dated July 22, 1985. He did not examine the worker but reviewed the medical records on file and concluded:

"I cannot but agree with Dr. Jones that the initial accident cannot be considered to have been psychopathogenic or to have initiated a series of psychological disorders lasting for four years. All of the investigations at DRC indicate hysterical symptomatology which is, of course, in this case very largely related to the character of the complainant, in view of the relatively innocuous accident. (Dr. Allodi's report) does nothing whatever to alter my opinion that this lady is not suffering from a genuine and true post-traumatic neurosis and I cannot see any basis whatever for recommending acceptance of psychiatric entitlement."

A radiological report by Ashfield Chiropractic Clinic describing findings of "severe thinning L5-S1". Two reports dated November 19 and November 30, 1982, by Ashfield Chiropractic Clinic. In the latter, the chiropractor notes he was unable to treat the worker on November 22, 1982, "due to her over-reacting and loud unrealistic protestations of pain".

Two reports from a subsequent chiropractor, Oscar Manias, to the WCB. The first dated December 8, 1982, gives the following diagnosis:

"Post-traumatic cervicothoracic and lumbar strain with complications. The condition appears to have progressed to a chronic one. There were post-traumatic contusions as well."

In his report dated January 21, 1983, he referred the patient back to her family doctor, noting his treatment was completed. Both reports are on WCB forms which ask whether the injury was sufficient to disable the patient from normal work and if so, how long, etc. The answer given in each is affirmative with the prognosis answered with a question mark.

In addition to the above medical evidence, the Panel heard testimony from the worker that she had pain constantly, and felt disoriented, and that her condition deteriorated since September of 1982. She cannot do housework, her husband and sister sharing the household chores. She spends her days resting, sometimes going to visit her sister, sometimes friends coming to visit, but she can do nothing for them. She could recall very little with respect to the accident or any subsequent treatment. She stated that prior to the accident, she felt she had been a good and conscientious worker, at some points holding two jobs.

The worker's representatives submitted that the WCB erred in describing the accident as innocuous and in failing to treat the worker for the compensable "conversion hysteria" diagnosed by PSEM in September, 1982. It was suggested that had the hysteria been treated early, i.e. in 1982, the worker would be employed today and that when Dr. Allodi treated her in 1983, it was too late to improve her condition. Reference was made to descriptions of "conversion hysteria" in Exhibit #2.

The Panel notes the preponderance of objective medical evidence available suggests that the worker's psychological problems are due not to the accident but rather to the desire for compensation and other factors unrelated to the accident. The reports cite the worker's lack of co-operation in proposed treatment. Her lack of motivation is suggested to be related to lack of English language skills and compensation. Her husband is noted as a predominant influence in her approach to her symptoms and compensation.

WCAT Decision No. 50 canvassed the difficulties in assessing medical evidence and subjective evidence in the claims of chronic pain. This Panel is not persuaded on the evidence before it that the medical evidence establishes a link between the accident and the pain related during the relevant period. The PSEM discharge diagnosis in September, 1982, when read in context, does not establish such a link.

The Panel considered the possibility of referring the worker to an outside medical advisor but noted that the worker had been examined already by two psychiatrists in the relevant period. These psychiatrists examined the worker closer in time to the accident and in her native language. The Panel was not persuaded that a referral at this point to a third psychiatrist would assist in the determination of the issue before it.

The subjective evidence of the worker given at the hearing was vague and did not add much to the evidence on the record. She felt pain on her left side, could not sit or concentrate for any length of time and had bouts of dizziness or disorientation. She previously worked as a cleaner and kitchen helper. She had not looked for work at anytime after her brief attendance at her accident employer to complete an application. Her own doctors appeared skeptical in their reports as to the reliability of her description of symptoms. When Dr. Allodi suggested English was what she needed to return to the work force, she said she sat in on a couple of classes at a local community centre and left as she could not concentrate.

On the evidence before the Panel, both objective and subjective, the Panel cannot conclude that any psychological problems suffered by the worker subsequent to September 27, 1982, were caused by the accident on September 10, 1981.

With respect to the organic injury, the Panel is of the opinion that the WCB assessment in September of 1982, that the worker had fully recovered physically from her injury is supported by the subsequent reports of her orthopaedic surgeon.

DECISION

The appeal is denied. The Panel finds that the worker was not entitled to further compensation from WCB beyond September 27, 1982.

DATED at Toronto this 25th day of June, 1986.

SIGNED: R.E. Hartman, B. Cook, D. Mason.

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Workers' Compensation Appeals Tribunal

DECISION NO. 111

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: N. McCombie

Member: M. Meslin



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

June 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 111

THE APPEAL PROCEDURE

The worker appeals the June 20, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, L. Carr. Mr. Carr's decision denied the worker entitlement for his back disability.

The appeal was heard on March 6, 1986, by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, N. McCombie, a member of the Tribunal representative of workers, and M. Meslin, a member of the Tribunal representative of employers.

The worker was present and was represented by M. Grimaldi, Assistant to M. Swart, M.P.P. The employer was represented by M. Jackson, solicitor. The Tribunal was assisted by R. Nairn from the Tribunal Counsel Office.

The Panel heard and considered testimony under oath of the worker. The Panel also read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials. The Panel also read and considered additional materials subpoenaed from Canada Life.

Submissions were made by the worker's and the employer's representatives and by the Tribunal's counsel.

THE ISSUE AND HOW IT ARISES

The worker was a radiator repairman from 1974 to March 24, 1984. From 1974 to 1977 he was employed by a radiator repair shop. According to the worker, the job at this shop did not entail heavy lifting or bending because mechanical assistance was available.

From 1977 to 1982 the worker was self employed in his own radiator repair business. The worker testified that he could not afford mechanical and electrical devices to assist with the lifting of radiators. This made the job much harder than it was at the radiator repair shop where he previously worked. The worker was required to immerse in a tank of water a radiator weighing approximately 20 pounds, in order to test for leaks. The radiator was then removed from the tank and was repaired on a bench. The bench was lower than the one the shop where he worked before. As a result, the worker was required to bend not only to test the radiator for leaks but also to work on the radiator on the bench.

The worker was employed by another radiator repair shop from December, 1982, to May, 1983. He then went to work with the accident employer in June, 1983, as a radiator repairman until he was forced to stop work on March 24, 1984, on account of a back disability.

The worker told the Panel that the test tank at the accident employer's premises was fairly low, making it necessary for the worker to bend over more than at any of his previous jobs. In addition, there was a bar jutting out from the

tank which prevented the worker from getting as close to the tank as he would have liked. Consequently, he had to hold the radiators at arms' length while inserting them into the tank. The bench was a piece of plywood resting on the top of part of the tank. It was lower than other benches of previous employers. This resulted in more bending while repairing the radiators.

In addition to radiator repairs, the worker also repaired gas tanks. This was heavier work than radiator repairs. The gas tanks weighed about 30 pounds on average and could weigh as much as 80 pounds. They were difficult to immerse in the test tank because they were filled with air. The worker felt that there was more strain on the back from gas tank repairs than from radiator repairs.

The worker first noticed back problems in 1977. A report from his family doctor, Dr. D. Ballyk dated October 29, 1984, confirms that the worker was first treated for lumbar pain in 1977. The worker stated that his back pain continued on and off after 1977.

In January, 1984, the worker first experienced numbness in his left leg. The numbness did not disappear. On March 24, 1984, the worker worked his usual Saturday half day. He stated that his back was bothering him in the morning more than it had previously. Later that day he visited his sister-in-law. It was during this visit that he bent over to look at something and felt a very sharp pain in his back. He was unable to straighten up. He has not returned to work since March 24, 1984. He seeks to establish entitlement to Workers' Compensation benefits after March 24, 1984, on account of his back disability. That is the issue before this Panel.

THE PANEL'S REASONING

There is uncontradicted evidence to support the worker's position that his jobs since 1977 involved heavy lifting and bending. The radiators weighed at least 20 pounds - more when filled with water - and the gas tanks were heavier still. The test procedure required a great deal of bending and lifting of gas tanks and radiators which were held at arms length. In particular, the positioning of a foot bar on the test tank at the accident employer required the worker to reach out in order to test the tanks and radiators, thereby increasing the strain on the worker's back.

The medical reports establish a relationship between the nature of the work and the disability. The December 21, 1984, report of Dr. Allan C. Gold, an orthopaedic specialist, states:

"It would not be unusual to extrapolate that this gentleman's present symptom patterns are either mainly or totally due to his previous job capacity as a radiator repairman. Although his radiographic picture denotes some narrowing at the lowest two disc levels of the spine, the lowest level almost certainly was narrowed in a developmental pattern because of the partial sacroilization of the 6th lumbar vertebra and would consider this as normal.

It is not unusual that this particular positioning that he had to maintain over many years' time, along with the significant heavy work that he was doing, would have caused a progressive degenerative change in one of the low lumbar discs causing initially a mild degenerative process, as well as a disc protrusion later on, causing the pain in his left leg.

I would suggest that this particular etiology would definitely cause this gentleman to be totally disabled at the present time for his present job capacity from the time of March to the present..."

Dr. Blair, an orthopaedic specialist, states in a letter dated June 3, 1985:

"He told me originally that his pain came on gradually and it is quite possible that the repetitive motion of bending and lifting put strain on his back, but he does not give me a specific incident which occurred at work and could have caused this back pain. Certainly, the type of work he does has aggravated the back, but whether or not it was directly caused by his work is difficult to determine, unless he could record some incident with witnesses, etc."

There is evidence of complaints prior to March, 1984. A co-worker, in 1982, reported the worker having problems "putting in a day's work" because of back problems. Dr. D. Ballyk, the worker's family doctor indicates that the worker may have complained about his back on several occasions, although nothing specific is recorded. According to notes taken by a WCB investigator, the service manager at the accident employer recalled that the worker complained of general back problems between January and March, 1984.

The worker himself testified that he experienced periodic back problems between 1977 and 1984, although they had not prevented him from working.

This Panel is satisfied that the evidence supports a relationship between the worker's back condition and his work as a radiator repairman. In reaching this conclusion we are of the opinion that the kind of heavy work performed by the worker put additional strain on his back, particularly after 1977. The medical reports, far from suggesting that there is some other medical condition to account for the worker's back condition, generally support a relationship between the kind of work being performed and the back condition.

We also accept the worker's evidence that, at least in the month of March, 1984, there was additional strain on his back which was caused by an additional workload. In reaching this conclusion we note that there are reports on file from the accident employer which would suggest that the workload in March was particularly light. However, in our opinion the worker gave a reasonable explanation for the apparent discrepancy between the number of radiator and gas tank repairs as reported by the employer and the additional amount of work performed by the worker, which was not included in the employer's records. The worker told the Panel that the company's repair records do not include radiators which were tested but not repaired. Moreover, the figures supplied by the company did not include approximately forty radiators put into stock in March, nor did they include additional radiators repaired by the worker for consignment stock in other

stores owned by the employer. At the hearing, counsel for the employer did not challenge the worker's explanation of the reason why the employer's records would not include the additional work done in March.

The Appeals Adjudicator's decision dated June 20, 1985, denied the worker's appeal for several reasons. Appeals Adjudicator Carr found that the worker had performed the same job for about 11 years with no recent changes or alterations. In addition, there was a non-occupational incident at the sister-in-law's which caused increased back symptoms. Finally, there was nothing unusual about the worker's work to have brought on the disability.

For a worker to establish entitlement, it is not necessary to demonstrate that a particular incident produced the disability. Obviously, it is easier to find that a disability arose out of and in the course of employment where a particular incident has precipitated the disability. However, the occurrence of a particular incident is already included in the Worker's Compensation Act¹ under the definition of accident as found in section 1(1)(a)(ii):

"accident" includes,

(ii) a chance event occasioned by a physical or natural cause.

But "accident" is also defined as "disablement arising out of and in the course of employment" in section 1(1)(a)(iii) of the Act. Presumably the Legislature, in including this definition, intended that entitlement could be established for non-incident related disablement.

The Board's Procedures Manual would appear to acknowledge that there need not be an incident to establish entitlement. In describing disablement, the procedure manual states in document 33-01-02:

"it is not sufficient that the disablement come on during work, but rather there must be something about the work which can be considered to have caused the disablement to come on, such as strenuous work - awkward position - unaccustomed strain - or even a movement arising out of the work which is reasonable to consider has caused the disablement."

Here, the worker has described a process which involves strenuous work. At the accident employer, the foot bar required him to stretch over the test tank holding the radiator or gas tank at arm's length in an awkward position. It occurred at a time when the workload was higher than normal because of the worker's efforts to build a consignment stock.

There is nothing in the Board's statement on disablement to require a specific incident, or a recent change in a longstanding work process. If the work process can be shown to involve strenuous work, or an awkward position, and the disablement is causally related to the process, then, in our opinion, the worker falls within

¹The pre-April, 1985, Act.

the disablement definition of accident. There is no doubt that the absence of a particular incident makes the task of determining whether the disablement arose out of the employment a more difficult one. Similarly, it is easier to establish a relationship between the disability and the work process where there has been a recent change in the process. However, neither of these factors is essential to establish entitlement in situations where there is a longstanding strenuous or awkward work process, with continuity of complaint, and supporting medical relationship between the process and the disability.

We are therefore of the view that, inasmuch as Appeals Adjudicator Carr reached his decision on the grounds that there was no recent change in a longstanding process and that there was nothing unusual about the worker's job, he failed to properly apply the Board's statement on disablement.

With respect to Appeals Adjudicator Carr's conclusion that there was a non-occupational incident which caused increased back symptoms, the worker's testimony, which we accept, establishes a continuity of back complaints after 1977 and also supports a conclusion that the non-occupational incident was extremely minor in nature. Thus, the significant cause of the worker's back condition was his employment. The non-occupational incident was only a minor triggering factor. We are of the view that although the worker's inability to earn income was triggered by the non-occupational incident, the real cause of his inability to earn wages was his employment-related back condition.

The Ontario Workers' Compensation Board Policy Manuals would not appear to have considered the effect on entitlement of a triggering incident which occurs out of the workplace. The issue has been considered by a number of American workers' compensation jurisdictions. In the New Jersey Atlantic County Court Decision of Daniello vs. Machise Express Co., a worker's uniform and body were permeated with fumes from jet fuel at work. Upon arrival at home after work, the worker struck a match. The jet fuel exploded. The worker's injuries were held to have been sustained "in the course of" the worker's employment. In reaching its conclusion, the court, after reviewing American authorities on the point, stated:

"Larson observed that the common element in these cases is the fact that the originating cause of the injury is something that occurs entirely within the time and place limits of the employment. The time bomb, so to speak, is constructed and started ticking during working hours; but it happens to go off at a time and place removed from the employment."

The court then reviewed several other decisions and concluded:

"Thus, it appears that our courts have already adopted the "origin" thesis espoused by Larson. The weight of reason supports this interpretation."

We are of the view that the "time bomb" concept described in the above decision is the proper way to interpret the phrase "disablement arising out of and in the course of employment" where the actual onset of the period of disability was triggered by a non-occupational incident. The origin of the worker's disabling injury in this case is founded in his employment as a radiator repairman. The time bomb, in the form of the worker's back condition, was constructed during his employment as a radiator repairman. It happened to go off because of a

non-occupational incident outside of the worker's employment. However, it was not the incident at the worker's sister-in-law's place that caused the lost time disabling injury. The origin of the disabling injury was the back condition caused by the worker's years of employment as a radiator repairman. We are therefore of the view that the worker's disablement arose out of and in the course of his employment.

DECISION

The appeal is allowed. We leave to the Board the determination of the manner and extent of compensation.

DATED at Toronto this 13th day of June, 1986.

SIGNED: J. Thomas, N. McCombie, M. Meslin.

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Workers' Compensation Appeals Tribunal

DECISION NO. 115

Tribunal d'appel des accidents du travail

Panel Chairman: A. Signoroni

Member: D. Jago

Member: S. Fox



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

May 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 115

THE APPEAL PROCEDURE

The worker appeals the decision dated March 7, 1985, of V.W. Ferguson, Appeals Adjudicator, which affirmed the Claims Review Branch decision dated April 30, 1984.

The appeal was heard on March 10, 1986, by a Panel of the Tribunal consisting of A. Signoroni, Panel Chairman, D. Jago, a member of the Tribunal representative of employers, and S. Fox, a member of the Tribunal representative of workers. Prior to the commencement of the hearing Mr. Fox disclosed to the parties his past involvement in negotiations at the plant where the worker was employed. The parties did not have any objection to him being a member of this Panel.

The worker appeared and was represented by D. Martin of Parkdale Community Legal Services.

The employer appeared in the person of T.E. Smith, Manager, Canadian Consumables Centre and was represented by Bill McCourt, a colleague of Mr. Smith. The Panel was assisted by Z. Onen of the Tribunal Counsel Office.

Although the worker testified in the English language, B. Kraszewski, an interpreter knowledgeable in the Polish language, assisted the worker from time to time.

The Panel heard and considered oral evidence given under oath by the worker and by Mr. Smith. It also read the recital of the facts contained in the Case Description prepared by Tribunal counsel and agreed to by the parties. The memoranda and reports attached to the Case Description were also considered. In addition to this information, Mr. Martin provided the Panel with an inter-office memorandum issued by the employer on November 15, 1984, and the relevant pages of an agreement between the employer and the local union.

Submissions were made by Mr. Martin, Mr. McCourt and Ms. Onen. Post-hearing written submissions were filed by Mr. Martin. Mr. McCourt did not reply to them.

THE ISSUE AND HOW IT ARISES

The worker is a maintenance electrician. On February 6, 1983, he sustained a back injury in the course of his employment. The WCB accepted his claim and temporary total benefits were paid.

On August 11, 1983, the worker was admitted to the WCB Hospital and Rehabilitation Centre, at the recommendation of his family doctor. He was discharged on September 9, 1983, with a diagnosis of lumbar strain and a treatment plan which included a return to modified work with restrictions for approximately two months.

In October of 1983, a vocational rehabilitation file was established for the worker and on October 4, 1983, the worker returned to modified employment with his accident employer but he said that the pain in his back precluded him from working more than two days.

On January 3, 1984, more recent X-rays indicated that the worker was suffering from a left posterolateral disc protrusion at L4, L5, a condition more serious than the one previously diagnosed.

On January 27, 1984, the worker was examined by Dr. Blau of the WCB. Dr. Blau stated in his report of this examination that the worker should be able to resume modified work with the accident employer as long as a better sitting arrangement than the one offered previously was provided.

On February 6, 1984, the worker and Mr. Smith met to discuss the kind of chair to be provided at his work station so as to render the modified work to be offered suitable for the worker's capabilities.

The testimony under oath of the worker and Mr. Smith indicates that an agreement on the type of chair which would be provided was reached and confirmed in a letter from Mr. Smith dated February 6, 1984. The letter also stated the following:

"We are hereby instructing you to report to work at the beginning of the day shift on Thursday, February 9, 1984. If you fail to report at the above time, we will assume that you have terminated your association with the Company."

The worker did not report for work on February 9, 1984, as required by his employer. On February 13, 1984, his employment was terminated effective that day. Even though the plant where the worker was employed was unionized, no grievance was ever filed by the worker.

In his testimony, the worker indicated that on February 9, 1984, he called the employer to advise that he was sick, but could not remember the name of the person to whom he spoke. The Panel noted that at the time of the accident the worker had been working for the same employer for six years and there is no evidence before this Panel which would indicate his lack of familiarity with the procedure to be followed by a worker at his plant when unable to report to work. On the other hand, Mr. Smith testified that he was never notified of any call from the worker either on February 9, or after the termination.

The worker's omission to provide the employer with any medical certificate to justify his inability to report to work on February 9, 1984, was dealt with in the worker's testimony. He testified that, on February 10, 1984, a medical certificate was not given to him by his family doctor. He further stated that after receipt of the termination letter he did not see the point of obtaining a medical certificate because by that time his employment was already terminated. The worker, however, obtained a medical certificate from his family doctor, on May 2, 1984. It confirmed that the worker was treated on February 10, and that at the time he was ordered to rest for a week.

According to the report of the rehabilitation counsellor dated February 20, 1984, the worker told him that he did not report to work for two main reasons. Firstly, the worker had an appointment with his family doctor on February 10, 1984. Secondly, the terms and conditions of the employment had to be worked out to the satisfaction of the worker prior to his return to work.

On March 7, 1984, the Claims Adjudicator informed the worker that his file would be closed on March 19, 1984, because he failed to accept a suitable job. By way of an undated letter, the worker objected to the decision rendered without mentioning that he was sick on February 9, 1984. To the contrary, the letter talks about the unresolved terms and conditions of the employment specifically regarding his classification and his rate of pay. Mr. Smith confirmed that the rate of pay of the modified employment was to be almost two dollars and fifty cents less than the rate as a maintenance electrician.

It is further noted that the worker's letter also stated the following:

"At Feb. 7/84, I received letter from (the employer) instructing me to report to work at Feb. 9/84. I phone my company and inform them that I am in touch with WCB counsellor and I have appointment at Feb. 13/84, for WCB decision about coming back to work. At Feb. 13 during my conversation with (the Rehabilitation Counsellor) I was informed Mr. Ted Smith phone WCB and told him I had been terminated...."

On April 30, 1984, the Claims Review Branch notified the worker that his file would not be closed but that as of March 19, 1984, he was only entitled to benefits which were paid on the actual wage loss he would have incurred had he returned to work on February 9, 1984, pursuant to section 41, subsection 2 then in force.

By letter dated May 4, 1984, the worker appealed the Claims Review Branch decision for the following reasons:

"According to letter I received, review specialist didn't take under attention my full health condition at the date Feb. 9/84. Beside my back problem at this date I had a flu and high fever which I reported to (the employer) and WCB counsellor and for this I have doctor certificate advising me to stay at home about one week time. Also my returning to work date was set up by company without coordinating with me and WCB Rehabilitation."

Similar comments were made in a subsequent letter from the worker dated September 10, 1984.

On March 7, 1985, Appeals Adjudicator Ferguson confirmed the decision of the Claims Review Branch. Once again, the worker objected to this decision in an undated letter by stating the following:

"I did want to go back to work for suitable position and I am still willing. My delay in returning (to employer) was on base of other sickness proved by doctor certificate."

The worker did not place in issue whether the modified employment was suitable. The issue before the Panel therefore is whether the worker failed to accept suitable modified employment which was available.

In the event that the Panel were to find that the worker failed to accept available suitable employment, another issue would be whether the reduction of benefits based on the actual wage loss he would have incurred had he accepted the modified employment is authorized under the terms of section 41, subsection 2, then in force. This issue, however, was not raised by the parties and therefore will not be addressed by this Panel.

THE PANEL'S REASONING

The Panel concludes, on the balance of probabilities, that the worker failed to accept suitable modified employment which was available.

The issue of whether the modified employment was "available" according to the terms of the Act was well argued by Mr. Martin who is to be commended for his thorough preparation of this case.

Mr. Martin submitted that although suitable, the employment under consideration could not be construed as being employment which was available because not all the terms and conditions pertaining to this employment had been clarified. For this reason the worker's failure to accept the employment was not unreasonable. The employer, on the other hand, submitted that the worker was not really negotiating in good faith because he constantly made unreasonable unilateral demands.

In resolving this issue, the Panel did not find Mr. Martin's argument convincing. The rate of pay of the modified employment offered to the worker was stipulated in the collective bargaining agreement and could not be altered simply to accommodate the worker's request. In this regard the employer confirmed that the company was unwilling to negotiate on this point but was prepared to reclassify the worker as a maintenance electrician at the appropriate level of seniority once he was able to resume his normal duties.

Mr. Martin also made reference to a specific clause of the collective agreement which contemplates that employees who are involuntarily downgraded for other than disciplinary reasons are not to have their rate of pay changed for at least a period of thirty days.

The employer submitted that this clause was enacted to cover reclassifications not due to work accidents and thus was not applicable to the worker. The employer further argued that in any event the proper course of action to be followed by the worker regarding this dispute was to accept the rate of pay offered and to subsequently file a grievance.

In the event that a worker chooses to ignore the well established practice to accept the employment first and to grieve later if the circumstances warrant, it is not open to this worker to argue that employment which was suitable was however not available because one or more of its terms and conditions may be in contravention of certain clauses of the collective bargaining agreement. In this case, a suitable job was available to the worker. Section 41(1)(a) of the Act makes provisions for workers' compensation payments to reduce the difference in pre-accident and post-accident earnings once the worker accepts modified employment after the accident.

The Panel noted that the worker was not consistent in his testimony regarding the understanding that he claimed to have of the wage loss provisions contemplated by the Act in similar circumstances. On the one hand, he testified that he was not aware of the wage loss provisions and the way they work. On the other hand, the rehabilitation counsellor reported that the worker asked him to arrange that any benefits by way of wage loss due to him be paid directly to the employer by the WCB. The condition stipulated by the worker was that he be retained in the classification of a maintenance electrician of his seniority with the corresponding rate of pay.

In the alternative, Mr. Martin argued that the worker did not fail to accept employment that was available because while sick, he was terminated and therefore he never had an opportunity to accept or reject it. This submission is based on the view that the worker was unable to commence modified employment on February 9, 1984, due to his being sick with the flu. However, the evidence supporting this finding is inconclusive.

The Panel accepts the employer's evidence that the worker did not call the employer to indicate that on February 9, 1984, he had the flu and was therefore unable to work.

In light of the serious letter that specified the termination of the employment if the worker failed to report to work on February 9, 1984, followed by the termination on February 13, 1984, the Panel has difficulty understanding why the worker failed to submit a medical certificate confirming his sickness until May 2, 1984.

In his conversation with the rehabilitation counsellor of February 9, 1983, the worker did not stress the flu as the main reason for not reporting to work on February 9, 1984.

Likewise, the worker's letter in reply to the decision made by the Claims Adjudicator does not make any reference to the flu, but is focused on the terms and conditions of the employment offered. However, the worker's subsequent letters appealing the original decision attribute the failure to accept the employment only to the flu suffered at the time.

For these reasons, it appears to the Panel that it is more probable than not that the worker was not willing, irrespective of the flu he may have had, to make an honest effort to try the employment which was made suitable and available after lengthy negotiations between the worker, the WCB, and the accident employer.

DECISION

The appeal is dismissed. The worker's entitlement to compensation remains as determined by the Board's Appeals Adjudicator.

DATED at Toronto, this 22nd day of May, 1986.

SIGNED: A. Signoroni, D. Jago, S. Fox.

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Workers' Compensation Appeals Tribunal

DECISION NO. 120

Tribunal d'appel des accidents du travail

Panel Chairman: N. Catton

Member: L. Heard

Member: R. Apsey



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION #120

APPEAL PROCEDURE:

The worker appeals the decision dated April 19, 1985, of the Appeals Adjudicator, Mr. L. Carr, which confirmed the decision of the Claims Review Branch dated September 6, 1984.

The appeal was heard on March 12, 1986, by a panel of the Tribunal consisting of N. Catton, Panel Chairman, L. Heard, a member of the Tribunal representative of workers, and R. Apsey, a member of the Tribunal representative of employers. The Panel was assisted by M. Faubert of the Tribunal Counsel Office.

The worker appeared and gave evidence under oath. He was represented by his lawyer Mr. E. del Junco. Mr. Horrigan, the employee's Union Steward, also gave evidence under oath. The employer was notified of the hearing but chose not to attend.

The Panel read and considered the Case Description as well as its attachments. Mr. del Junco also provided the Panel with some legal cases in support of the worker's position. The Panel had before it a letter from a number of co-workers dated March 7, 1986. The worker also prepared a diagram of the accident site. In addition to this information, the Panel had the Master Agreement and the Rule Book. At the end of the hearing, submissions were made by the worker's representative and the Tribunal counsel.

ISSUE AND HOW IT ARISES:

On September 24, 1984, the worker was employed as a dockman. His job was to drive cars parked on the company lot to a loading dock. The 44 acre lot is paved and there are double rows of new cars waiting to be transported. There are laneways between the rows of cars. On the day of the accident instead of using the laneway to reach his destination, the worker cut through a gap in the parked cars and collided with another car travelling down the laneway. The driver of the car that was hit lost control of the vehicle and hit a third parked car. In total there was about \$15,000 damage to all three cars.

The worker testified that it was getting dark at the time of the accident and it was raining and slightly foggy. He also testified that the driver of the other car had not put on his lights. The worker described the visibility as poor and said that a cautious driver would have used his lights.

The worker does not dispute that the accident resulted from his own negligence because the car he hit had the right of way. Because the accident resulted in \$15,000 damage to three new vehicles the employer suspended the worker for three weeks pursuant to the Master Agreement. The suspension was later reduced to two weeks following a grievance.

As a result of this accident, the worker sustained a whiplash type injury and was off work until November 5, 1984. He applied for compensation benefits for this six week period. The Board has consistently denied his claim because it determined that the accident was the result of his serious and wilful misconduct.

In order to determine this case it is important to look at the wording of Section 3 of the Act which reads:

"Where in any employment, to which this Part applies, personal injury by accident arising out of and in the course of the employment is caused to a worker, his employer is liable to provide or to pay compensation in the manner and to the extent hereinafter mentioned, except where the injury,

(a) does not disable the worker beyond the day of accident from earning full wages at the work at which he was employed; or

(b) is attributable solely to the serious and wilful misconduct of the worker unless the injury results in death or serious disablement. R.S.O. 1980, c.539, s.3(1);¹

In keeping with the statute, the Panel must answer the following question:

1. Was the accident solely attributable to the serious and wilful misconduct of the employee?
2. Was the action of the worker, cutting through a gap, serious and wilful misconduct?
3. Did the injury caused by the accident result in serious disablement?

THE PANEL'S REASONING:

The Panel accepted the worker's evidence that it was rainy and foggy on the night of the accident. It also accepted his evidence that the other driver had not turned on his lights. In the Panel's view these factors contributed to the accident. The appeal could, therefore, be allowed simply because the accident was not solely attributable to the conduct of the worker. However, it is clear from the testimony of the worker that the primary cause of the accident was his own negligence when he failed to yield to the other driver's right of way.

The Panel felt it was necessary to deal with the worker's negligence and also to address the Board's position. In essence, the Board found that the worker disobeyed the rule against cutting through a gap and that this disobedience was in fact serious and wilful misconduct. The premise for the Board's decision is enunciated in its policy, part of which reads as follows:

¹Any reference to the Act in this decision refers to the Act as it read prior to April, 1985.

"Inattention will not constitute serious and wilful misconduct nor, as a rule, will mere imprudence, negligence, lack of care or caution.....

Disobedience to an express order or a deliberate breach of law or rule, well known to the worker and designed for his safety and enforced, will generally be held to be serious and wilful misconduct. Each case must be determined upon its own particular circumstances."

The evidence available to the Panel, both from the worker and his Steward, fails to establish that any notice was posted about a rule concerning cutting through a gap. The Steward also testified that he received copies of every reprimand and in his three years as Union Steward had not seen a reprimand for cutting through gaps. Both the worker and the Steward agreed that cutting through gaps was a common practice. This information was confirmed in the letter presented to the Panel from other employees. The Panel also had the employer's Rule Book before it and there was no reference to cutting through gaps. The letter of suspension from the employer to the worker indicates that the worker was suspended because of the seriousness of the accident. No reference was made to a breach of the rule about cutting through gaps in that letter.

There is, however, evidence in the file that the foreman advised the Claims Adjudicator that short cuts are taken and workers are given written reprimands if they are caught. The employer did not attend the Appeals Adjudicator hearing or the Tribunal hearing and has not provided any written confirmation of this position. This information from the foreman was confirmed by the Union Business Agent in a conversation with the same Board employee. However, at the Appeals Adjudicator hearing the Business Agent said:

"... I have never checked my file of anybody being reprimanded on taking short cuts going through rows.

I do know that the guys on the dock, not driveaway guys, but dock guys, they will go between the rows if there is a space of three or four vehicles there.

But for me to get in and debate whether - I know of no posting instructions that disallows it. I would have to assume, and I agree probably with the foreman, that if they see somebody jumping rows they might say to him, hey, don't do that or something. But I don't know it as per se, as a company rule that is posted."

Taking all of the evidence into account, the Panel accepts that rows are for parking cars, laneways are for driving and it is more prudent not to drive through the rows. The worker and the Union Steward acknowledge this. The Panel, however, does not accept that there were notices of the rules prohibiting cutting through gaps. In addition, there is no evidence that other workers who also cut through gaps had been reprimanded for this practice. In fact, there was evidence before us that supervisors had been with the worker when he had cut through gaps and had not commented on this action.

The Panel also had before it a number of legal authorities to assist it in determining whether the Board's policy concerning serious and wilful misconduct was reasonable. These authorities could also assist the Panel in the interpretation of the words "serious and wilful misconduct". The Panel has decided not to comment on the policy because in its view the worker's actions are not properly described as misconduct, according to the policy.

In respect to injury caused by the accident, the Board policy indicates that the disablement will be considered serious if the worker is disabled for at least six weeks. In accordance with this policy a worker is entitled to benefits for a disability lasting at least 6 weeks even if the accident was the result of the workers own serious misconduct. The worker's representative argued that this was an unreasonable test. The Panel has not addressed this aspect of the policy because the worker was disabled for 6 weeks.

We find that there were no notices about a rule concerning cutting through gaps, nor was there any evidence before the Panel that if such a rule exists, it has been enforced by the employer. It is therefore not possible to say that the worker breached a rule which was well known to him. His actions may have been negligent or careless but they could not be described as intentional or wilful.

In the Panel's opinion, the worker's actions did not constitute serious and wilful misconduct. We are also of the view that the accident was not solely attributable to the worker's actions. The worker is, therefore, not disqualified from receiving benefits for the disability arising out of his accident on September 24, 1984.

DECISION:

The appeal is allowed. The Workers' Compensation Board is directed to determine the benefits payable from September 24 until his return to work on November 5, 1984.

DATED at Toronto, Ontario this 8th day of April, 1986.

SIGNED: N. Catton, L. Heard, R. Apsey

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Workers' Compensation Appeals Tribunal

DECISION NO. 122

Tribunal d'appel des accidents du travail**Panel Chairman: A. Signoroni****Member: D. Beattie****Member: K. Preston****LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT****May 1986****Workers' Compensation Appeals Tribunal**

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 122

IN THE MATTER OF an application pursuant to
Section 15 of the Workers' Compensation Act,
R.S.O. 1980, c. 539, as amended.

AND IN THE MATTER OF an action commenced in
the District Court of Ontario at the City of
Toronto as Action No. 214839.

B E T W E E N:

FRANCIS HAUCK and WOOD-MILLER SAW
& KNIFE LTD.

Applicants in this application
and Defendants in the District
Court action.

- and -

JOHN DUNN, FLORENCE DUNN and
MONTGOMERY ELEVATOR CO. LIMITED

Respondents in this application
and Plaintiffs in the District
Court action.

WORKERS' COMPENSATION APPEALS TRIBUNAL

SECTION 15 APPLICATION

This Section 15 Application arises out of a lawsuit between the Plaintiffs, John Dunn, Florence Dunn and Montgomery Elevator Co. Limited, and the Defendants, Francis Hauck and Wood-Miller Saw & Knife Ltd., launched on February 6, 1984, in the District Court of Ontario at Toronto.

The Application was made by the Defendants and was heard on March 12, 1986, by a panel of the Appeals Tribunal consisting of A. Signoroni, Panel Chairman, D. Beattie, a member of the Tribunal representative of workers, and K. Preston, a member of the Tribunal representative of employers.

The Applicants did not attend but were represented by Mr. N. Taylor from the firm of Lyons, Arbus & Goodman.

The Respondents did not attend but were represented by Mr. U. Suits from the firm of Harries, Houser.

The Tribunal was assisted by D. Starkman, the Tribunal's General Counsel, who appeared at the hearing as the Tribunal's counsel.

The Panel heard and considered an agreed Statement of Facts and a consent order submitted by the parties together with relevant documents and correspondence introduced as Exhibits 1 to 8 at the hearing. Submissions were made by Mr. U. Suits on behalf of both parties and by Mr. Starkman.

THE ISSUE AND HOW IT ARISES:

The agreed Statement of Facts states the following:

1. The plaintiff, John Dunn, was born on July 13, 1940. He is a maintenance supervisor for the Montgomery Elevator Co. Limited and he has worked for this firm for the past fourteen (14) years.
2. On February 2, 1983, John Dunn was a passenger in a motor vehicle which was owned by his employer, Montgomery Elevator Co. Limited. The vehicle was being operated by a fellow employee.
3. The two men had left the corporate headquarters of Montgomery Elevator Co. Limited in Mississauga and were proceeding to the Gateway Postal Station to have a meeting with regard to the malfunctioning of the elevators at that location.
4. They had been driving for approximately five minutes when the accident occurred and were about 10 - 15 minutes from their destination. The collision occurred when they were struck in the rear by the defendant, Mr. Francis Hauck.
5. Mr. Francis Hauck is currently 25 years of age and lives in Mississauga. He is employed as a salesman for Wood-Miller Saw & Knife Ltd. and had been employed by that company for about 6 months prior to the accident.

6. At the time of the accident, Mr. Francis Hauck was a salaried employee working in sales. His responsibilities were Western Canada and the industrial division of Ontario. In this regard, his job was to maintain existing customer accounts and to develop some areas of business for the company.
7. At the time of the accident, he was operating a motor vehicle which was owned by his employer.
8. The accident occurred on February 2, 1983, between 10:00 and 10:30 a.m.
9. On this particular occasion Mr. Hauck began his business day at his home at about 8:30 in the morning. He was making telephone calls to various customers and prospective customers.
10. He left his residence about 9:30 a.m. and was proceeding to a Beaver Lumber store at the time of the accident happened. This particular Beaver Lumber store was a new account that he was hoping to acquire. He had phoned to make sure the purchasing manager was in and he knew that this location carried his competitors' line and he intended to go to the store to check the price of his competitor's line and then have a discussion with the purchasing manager. The accident occurred while he was travelling to this location.
11. Both Montgomery Elevator Co. Limited and Wood-Miller Saw & Knife Ltd. cover their employees under the Workers' Compensation Act. On the day in question both men were acting in the course and scope of their employment.

As previously stated, the Respondents started a lawsuit in the District Court of Ontario at Toronto on February 6, 1984.

By consent of the parties, only the rights of the Respondents, John Dunn and Montgomery Elevator Co. Limited, to bring the above lawsuit against the Applicants are to be determined in this Application.

The issue therefore is whether this is a personal injury by accident arising out of and in the course of employment.

THE PANEL'S REASONING:

In this case the parties filed a consent order which reads as follows:

- "1. That an Order go pursuant to Section 15 of the Workers' Compensation Act, declaring that at the time of the said accident of February 2, 1983, both the plaintiff, John Dunn and the defendant, Francis Hauck were acting in the course of their employment;
2. That an Order go pursuant to Section 15 of the Workers' Compensation Act, declaring that rights of the plaintiff John Dunn, to bring the above action against the defendants are taken away pursuant to the within legislation."

This Tribunal has the duty under the Act to decide whether an action is one the right to which is taken away by the Act. In deciding this, the Tribunal must interpret the Act. The Tribunal's legislative mandate to interpret the Act, its responsibility concerning the non-represented interests in the proper administration of the compensation fund as well as the non-adversarial nature of the Tribunal's proceedings prevent the Tribunal from considering itself bound by parties' agreements concerning conclusions of law or statements of fact. However, in many cases agreements on facts will be useful and assist the Tribunal in expediting a hearing.

In this case even though the parties proceeded by way of an agreed Statement of Facts, Mr. Suits presented clear evidence at the hearing which established the following:

1. that Montgomery Elevator Co. Limited and Wood Miller Saw & Knife Ltd. are Schedule 1 employers;
2. that John Dunn and Francis Hauck were employees of Schedule 1 employers; and
3. that at the time of the motor vehicle incident on February 2, 1983, both John Dunn and Francis Hauck were in the course of their employment.

DECISION:

1. The Application is allowed.
2. John Dunn and Francis Hauck at the time of the accident on February 2, 1983, were in the course of their employment.
3. The right of action of John Dunn and Montgomery Elevator Co. Limited has been taken away by Part 1 of the Workers' Compensation Act as against Francis Hauck and Wood-Miller Saw & Knife Ltd.
4. The right of action of Florence Dunn as against Francis Hauck and Wood-Miller Saw & Knife Ltd. was not an issue in this Application and, therefore, was not determined.

DATED at Toronto this 15th day of May, 1986.

SIGNED: A. Signoroni, D. Beattie, K. Preston.

District Court No. 214839

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 122

IN THE MATTER OF an application
pursuant to Section 15 of the Workers'
Compensation Act.

AND IN THE MATTER OF an action
instituted in the District Court of
Ontario at Toronto as Action No.
214839.

B E T W E E N:

FRANCIS HAUCK and WOOD-MILLER SAW
& KNIFE LTD.

Applicants/
Defendants

- and -

JOHN DUNN, FLORENCE DUNN and
MONTGOMERY ELEVATOR CO. LIMITED

Respondents/
Plaintiffs

WORKERS' COMPENSATION ACT
SECTION 15 APPLICATION

CA24N
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Workers' Compensation Appeals Tribunal

DECISION NO. 125

Tribunal d'appel des accidents du travail

Panel Chairman: L. Bradbury

Member: K. Preston

Member: S. Fox

LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION #125

This is an application by the employer under Section 21(2) of the Workers' Compensation Act for a determination by the Appeals Tribunal of the employer's request that the worker submit to a medical examination.

A hearing was scheduled for March 14, 1986. Prior to the hearing and following discussions between the Tribunal Counsel Office and the parties, the Panel was advised that the matter was settled.

Attached as Appendix "A" is the Memorandum of Agreement entered into between the parties.

In accordance with this Agreement the employer's application is withdrawn. The matter is remitted to the Workers' Compensation Board for further determination of the worker's claim for compensation.

DATED at Toronto this 1st day of April, 1986.

SIGNED: L. Bradbury, K. Preston, S. Fox

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION #125

APPENDIX "A"

IN THE MATTER OF (the Worker)

AND IN THE MATTER of an Application to the
WORKERS' COMPENSATION APPEALS TRIBUNAL
pursuant to Section 21(2) by the Employer.

MEMORANDUM OF AGREEMENT

The parties hereby agree to settle this Application on the following basis:

1. The worker agrees to attend for a medical examination of her thumb by a doctor selected and paid for by the employer at the Evans Medical Clinic.
2. The doctor selected will be a specialist in industrial medicine. The extent of the medical examination will be restricted to questions concerning her thumb, including the history of the accident, and the present condition.
3. The worker can have an independent interpreter paid for by the employer present at the examination and can have a personal representative accompany her during the examination.
4. Copies of the doctor's report will be provided to the worker, employer, the Workers' Compensation Board and Tony Muszynski at the Central Toronto Community Legal Clinic, 364 Bathurst Street, Toronto.
5. The worker agrees to provide releases as necessary to the Compensation Board and to request that the Board obtain any further notes, test results, X-rays or other relevant information from Doctors M. Roach, Zatelny, Nhiep, Xuan Bui, Dale, Babyn, and Hen Thoi and any other doctors who have examined her thumb since January, 1984, concerning her thumb injury.
6. The examination at the Evans Clinic will proceed before April 30, 1986, with written notice to the worker and Tony Muszunski at 364 Bathurst Street, Toronto. (Central Toronto Community Legal Clinic)
7. The Section 21(2) appeal is withdrawn without prejudice to either parties' right to commence a future appeal concerning this matter.

DATED at Toronto the 14th day of March, 1986.

"signature"

The Worker

"signature"

The Employer

CA24N
L95
- D21

Workers' Compensation Appeals Tribunal

DECISION NO. 127

Tribunal d'appel des accidents du travail

Panel Chairman: A. Signoroni

Member: D. Jago

Member: D. Beattie



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

May 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 127

THE APPEAL PROCEDURE

The employer appeals the decision dated April 9, 1985 of N. Holsmer, Appeals Adjudicator, which overruled the Claims Review Branch decision dated March 12, 1984.

The appeal was heard on March 17, 1986, by a Panel of the Tribunal consisting of A. Signoroni, Panel Chairman, D. Jago, a Tribunal member representative of employers, and D. Beattie, a Tribunal member representative of workers.

The employer was represented by A.D. Murray, Claims Agent. The worker appeared and was represented by C.W. Carew, Chairman, Ontario Legislative Board, United Transportation Union. The Panel was assisted by G. Dee, of the Tribunal Counsel Office.

The Panel heard and considered oral evidence, given under oath, by the worker. It also read the recital of the facts contained in the Case Description prepared by Tribunal counsel and agreed to by the parties. The memoranda, reports and the transcript of the Appeals Adjudicator hearing attached to the Case Description were also considered. It received at the hearing as well other documentary evidence presented by Mr. Carew and two relevant studies presented by Tribunal counsel. Submissions were made by Mr. Carew, Mr. Murray and the Tribunal counsel.

THE ISSUE AND HOW IT ARISES

The worker is claiming compensation for bilateral hearing loss on the basis that it was caused by his exposure to industrial noise during his employment with his employer.

Hearing impairment caused by exposure to industrial noise is considered an industrial disease under section 122 of the Workers' Compensation Act. The WCB policy concerning this matter is set out in Directive Number 19 under section 122 of the Claims Services Division Manual. The relevant sections of the policy read as follows:

- "1. Hearing loss and tinnitus resulting from exposure to hazardous noise levels in employment in the Province of Ontario is accepted as an industrial disease under Section 122 and Section 1-(1)(n) of the Act as peculiar to and characteristic of such exposure.

2. INDUSTRIAL NOISE - INDUCED HEARING LOSS

- 2.1 Based on medical advice, INDUSTRIAL NOISE-INDUCED HEARING LOSS CLAIMS are favourably considered when all the following circumstances apply:

- 2.1.1 There is a clear and adequate history of five or more years of exposure to hazardous noise, 90 decibels "A" scale, for eight hours per day, or equivalent as noted below: (Ontario Ministry of Labour Regulations).

<u>COLUMN 1</u>	<u>COLUMN 2</u>
Sound level in decibels	Duration - Hours per 24 hour day
90	8
92	6
95	4
97	3
100	2
102	1 1/2
105	1
110	1/2
115	1/4 or less
Over 115	no exposure

NOTE: Sound levels in excess of 90 decibels ("A" scale), will reduce the 5 or more year exposure requirement.

- 2.1.2 The frequency level and type of exposure is known.

- 2.1.3 The average of the four speech frequency levels 500, 1000, 2000, and 3000 Hertz (Hz.) in the American National Standards Institute (ANSI) or International Standards Organization (ISO) audiograms is 25 decibels in each ear.

- 2.2 Since individual susceptibility to noise varies, claims which do not meet the criteria set out in 2.1 are individually judged on their own merit having regard to the nature of the occupation, the extent of exposure, and any other factors peculiar to the individual case. The benefit of doubt applies."

The worker commenced employment with the employer in 1947 and until 1979 he worked as a trainman with some occasional conductor assignments. From 1979 until his retirement in 1985 he worked as a conductor. As a trainman, he had many duties including riding either in the locomotive or in the caboose. As a conductor he spent all his working hours riding in the caboose.

There is very little direct evidence on file as to the exact levels of noise that the worker was exposed to. There is, however, evidence as to the levels of noise typically found in trains generally. This information consists of two pieces of internal correspondence that the employer provided to the WCB, as well as several exhibits submitted at the Appeals Adjudicator hearing by the worker's representative.

The worker testified that he first noted hearing problems in the early seventies. This condition was never identified to the employer for fear of losing his employment. According to the worker, his hearing loss was due to exposure to a combination of sounds coming from the diesel engine, the whistle, the bells, the setting and releasing of brakes and the twisting and grinding of the body of the locomotive and the caboose.

There is no indication in the file of exposure to hazardous noise levels in non-occupational settings. This was confirmed by the worker in his testimony. In this regard he was questioned about his hobbies, lifestyle and other non work-related activities. There is also no indication on file of noise exposure with any other employer.

The Claims Review Branch upon examining all of the information on file, concluded that the worker had not been exposed to sufficient noise in the course of his employment to cause the hearing loss present on examination.

The Appeals Adjudicator, with the benefit of additional information submitted by the worker's representative, found that the worker had been exposed to noise above 90 decibels, and that he was now suffering from bilateral sensorineural hearing loss. On those grounds the appeal was allowed.

The issue before the Panel therefore is the extent to which if at all, the worker's hearing loss resulted from exposure to industrial noise related to his employment.

THE PANEL'S REASONING

The Panel concludes, on a balance of probabilities, that the worker's bilateral noise induced hearing loss resulted from exposure to industrial noise during the specific circumstances of his employment career as a trainman and conductor.

At the hearing the worker was questioned by Mr. Murray, by Mr. Carew, by Tribunal counsel and by the Panel members. The Panel finds the worker to be a credible and honest witness.

The Panel accepts the evidence that the worker was not involved in noisy hobbies or activities, and that he had no ear problems until he started his forty year career as a trainman and conductor.

Mr. Murray's submissions made reference to the question of medication that the worker was taking for his heart condition starting in 1979. There is some evidence that the worker was taking prescription drugs such as Betaloc 100 (one tablet twice daily) and Moduret TMSD (one tablet a day). However, there is no medical evidence before this Panel which would indicate that those prescription drugs would cause hearing loss.

The evidence accepted by the Panel supports the inference that the worker's hearing loss is an industrial disease which arose out of and in the course of employment.

In the case of noise induced hearing loss there is a relationship between hearing loss and the extent of the exposure to loud noise. According to the Board policy previously referred to, where the worker is exposed to noise of 90 decibels for 8 hours per day for a period of five years or more and noise induced hearing loss results, the worker will have established entitlement to benefits.

Mr. Murray did not contest the fact that the worker had suffered a bilateral hearing loss. Although, he did not present any new evidence at the hearing, he did take issue with the amount of time the worker spent in noisy cabooses where the worker may have been exposed to intermittent noise of 90 decibels. However, this kind of exposure, with minor exceptions, was not occurring daily and did not last for hours at a time.

Although the worker qualified as a conductor in 1953, he was not a full time conductor until 1979. This would involve the worker riding in the locomotive most of the time during the longest portion of his career. The worker further stated that from 1947 to 1957, he rode on steam locomotives which were described by the worker as very noisy. Even though there is no evidence before this Panel concerning noise levels in steam locomotives the Panel accepts the proposition that they were more probably than not more noisy than the diesel locomotives employed since 1957.

Both parties argued the issue of the extent of exposure to loud noise. In this regard, the Panel accepts that the noise exposure could have been as short as several seconds or as long as several hours at a time. In his submissions, Mr. Murray relied upon the employer's study concerning noise levels test on several cabooses. The study shows no reading above 90 decibels. However, several studies submitted by Mr. Carew at the Appeals Adjudicator hearing indicate that locomotives and cabooses similar to those used by the worker generated readings in excess of 90 decibels. On this evidence, the Panel finds it to be more probable than not that in many instances the worker was exposed to noise in excess of 90 decibels. On this ground, the five year requirement is shortened in accordance with section 2.1.1 of the Board Policy.

The study entitled "The Report on the Designation of Noise in Ontario - Volume 1 - Ministry of Labour", dated November, 1982, presented to the Panel by Tribunal counsel, states the following on page 2.3:

"In measuring noise levels, it is necessary to distinguish between two basic types of noise: "continuous noise" and "impulsive or impact noise".

The term "continuous noise" is used to mean a steady or uninterrupted noise which is characterized by a relatively constant sound level over a long period of time or during the period of measurement. "Impulsive noise" means a short burst of noise such as that produced upon collision of two metal bodies (as in dropforging), or by an explosion. If sounds from "continuous noise", "impulsive noise" or a combination of the two deviates momentarily and perhaps repeatedly from the ambient or background level for a time period of one second or more, the noise is described as intermittent."

This study further states that impulsive noise is a more difficult type of sound to measure because of the rapid and often complicated pressure changes involved (whistle and bell ring noise).

The Panel is satisfied that the evidence introduced establishes that the worker's exposure to loud noise in the course of his employment history would typically fall in the category of impulsive noise which is not easily measured.

Dr. J.M. Nedzelski is the specialist who examined the worker on several occasions between 1983 and 1985. In his opinion, the audiograms taken support a finding that the worker's hearing loss is directly related to noise exposure during the course of his employment.

It would appear that one of the reasons the Claims Review Branch had denied entitlement was that it did not have all the facts. Mr. Carew, who also represented the worker at the Appeals Adjudicator hearing, presented at that hearing 10 exhibits which were not available to the Claims Review Branch.

Furthermore, in his report dated May 3, 1985, Dr. M.A. Hayley of the WCB wrote:

"The worker has sufficient industrial noise induced hearing loss to meet our criteria for allowance of the claim."

However, the evidence accepted by this Panel does not clearly establish the specific levels of exposure and the corresponding duration. On this ground, this case could not be adequately adjudicated within the four corners of section 2.1 of the WCB policy.

In those circumstances section 2.2 of the WCB policy becomes relevant as it provides that claims which do not meet the criteria set out in section 2.1 are to be individually judged on their own merits. This principle was accepted in Decision No. 22 of this Tribunal.

In this regard, Mr. Murray argued that many other workers with a comparable employment history are free from hearing loss. However, the Panel must look at the effect of the exposure on this individual worker and not base its decision on how an "ordinary worker" would respond in a similar situation.

On the evidence as found, the Panel finds that it is more probable than not that in the unique circumstances of this case, the worker's bilateral noise induced hearing loss resulted from exposure to industrial noise related to his employment.

DECISION

The appeal is dismissed. The worker's entitlement to compensation remains as determined by the Board's Appeals Adjudicator.

DATED at Toronto, this 2nd day of May, 1986.

SIGNED: A. Signoroni, D. Jago, D. Beattie

Workers' Compensation Appeals Tribunal

DECISION NO. 129

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: B. Cook

Member: D. Mason



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 129

THE APPEAL PROCEDURE:

The worker appeals the July 5, 1985, decision of the Workers' Compensation Board Appeals Adjudicator T.D. Allamby.

The appeal was heard on March 18, 1986, by a panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, B. Cook, a member of the Tribunal representative of workers, and D. Mason, a member of the Tribunal representative of employers.

The worker appeared and was represented by J. McKinnon of Central Toronto Community Legal Clinic. No one appeared on behalf of the employer. Z. Onen and W. Corston appeared for part of the hearing on behalf of the Tribunal's Counsel Office.

The Case Description was marked as Exhibit #1, the transcript of the proceedings before the Appeals Adjudicator was marked Exhibit #2, and an Affidavit of Service sworn by Joseph T. Hall on March 17, 1986, was marked Exhibit #3.

THE ISSUE AND HOW IT ARISES:

The worker claims entitlement to benefits because of injuries he suffered in an accident on June 26, 1984, while he was unloading pipes at his employer's job site. Appeals Adjudicator Allamby concluded there was no proof that an accident occurred on June 26, 1984. The accident was unwitnessed. Thus, the only evidence as to the occurrence of an accident came from the worker. As a result, at the Appeals Adjudicator level, as at this level, the appeal turned on the credibility of the worker.

Appeals Adjudicator Allamby chose not to accept the worker's evidence because he found that the worker's statements throughout the file with respect to the onset of back symptoms were contradictory. In particular, he noted that whereas the worker described to him an onset of back pain which occurred when the worker was attempting to push or roll a particular pipe, he told a WCB Portuguese interviewer on August 28, 1984, that the onset of back pain was gradual and was not related to a specific incident on the date in question. Moreover, in the report of Dr. T. dated July 31, 1984, there is no mention of any incident on June 26, 1984. The Appeals Adjudicator also noted that a co-worker was unable to recall the mention of a specific incident other than a general comment about experiencing back pain following the unloading of pipes from a truck. The Appeals Adjudicator described in page 5 of his decision a further inconsistency in that on January 15, 1985, in an interview with the Board, the worker blamed his work in general for his back problems occurring June 26, 1984, and stated that the onset of symptoms were gradual. These inconsistencies led the Appeals Adjudicator to make an adverse finding with respect to credibility and as a result, the Appeals Adjudicator was unable to find evidence to support the occurrence of a specific incident on June 26, 1984.

THE PANEL'S REASONING:

During the course of the hearing, the worker and a co-worker were questioned by the worker's representative and by members of the Panel. This Panel has carefully considered the decision of the Appeals Adjudicator and has particularly noted the material in the file which led the Adjudicator to conclude that the worker's credibility has been impeached.

The worker told us that he had been employed by the accident employer for eight days prior to the incident of June 26, 1984. According to the worker, one thing that was unusual about June 26, 1984, is the fact that it was the first occasion on which the worker had been asked to unload pipes weighing 200 to 300 pounds, with the assistance of mechanical devices. The worker described this work as the heaviest work he had performed since commencing his employment with the accident employer. It should be noted that the worker, who was 61 years old at the time of the incident, had not worked for several years prior to commencing employment with the accident employer due to a prior compensable injury for which he receives a permanent pension.

After the accident occurred, the worker testified that he mentioned the incident to a co-worker and that he also reported the injury to his foreman, Vince.

In our view, it is not necessarily inconsistent on one occasion to describe the onset of back pain as occurring while unloading pipes and on another occasion to describe it as occurring while unloading a specific pipe. The unloading of a specific pipe is part of a job of unloading pipes. Depending on the way in which the question is posed, it may generate either of the two possible answers, and the particular circumstances need to be examined to determine whether there is an inconsistency. Obviously, if the inconsistency is significant, it causes one to question whether anything happened on June 26, 1984, to precipitate a back problem. In other words, if a worker is fabricating evidence to obtain compensation, the falsehood will sometimes be uncovered by comparing significantly different versions of the description of the event in different interviews with the worker.

In this case, we fail to see how any of the matters referred to by Appeals Adjudicator Allamby in reaching his conclusions constitute inconsistencies of such a magnitude so as to lead us to the conclusion that the worker has fabricated the events of June 26, 1984. It is perhaps important to state at this point that in our view, as long as we are satisfied that there was something that occurred at work on June 26, 1984, to produce a disabling back condition, entitlement will have been established. A specific incident is not required. The Board's definition on disablement encompasses awkward positions, strenuous work, etc.

Dealing first with the evidence that supports the worker's position, we note that the worker sought medical attention on June 27, 1984, the day after the incident, and described his injury as resulting from pushing heavy concrete pipes. He told the Panel that he went to the doctor's office without an appointment at 8:30 the morning after the incident.

The co-worker was interviewed by the Workers' Compensation Board on January 15, 1985, and confirmed that sometime at the end of June, 1984, he recalled the worker complaining of pain affecting his lower back. He could not relate it to a specific incident. The same co-worker testified under oath before this Panel and recounted essentially the same version of events. He could not specify an exact date but was able to advise us that the back complaints occurred on the last day that the worker worked for the accident employer. It is undisputed that the worker did not return to the accident employer after June 26, 1984. The co-worker indicated that he rode to and from the job site with the worker and that the worker complained about back pain on the way home or when they were changing at the end of the day. There was some discrepancy between the timing of the incident as described by the worker and the co-worker's recollection of when it might have occurred. However, given the lapse of time, we do not feel that an inability to accurately confirm the timing of the event affects our view of the co-worker's credibility. We also note that the co-worker indicated that the only time the worker complained about his back pain was on the one occasion after work on the last day he was with the accident employer.

It is difficult not to conclude that something happened on June 26, 1984, when faced with corroborating evidence of a co-worker, which is internally consistent with a previous statement given over a year ago, and in light of the prompt seeking of medical attention in which the history of complaint is consistently described.

With respect to Dr. T.'s failure to describe the June 26, 1984, accident in his report of July 31, 1984, the worker indicated that he told Dr. T. about several other accidents as well as the June 26, 1984, accident. The worker has several previous claims for back entitlement. Dr. T. makes no reference of any specific history. Dr. T. does not speak Portuguese. The worker does not speak English. There was no interpreter. One can surmise that there exists the possibility of a language barrier which would make it difficult for Dr. T. to have taken down a complete history.

As to recalling a particular incident, the worker came into the Board's office on July 16, 1984, and described a specific incident involving the moving of a concrete pipe with the palm of his right hand. In a Board memo dated August 7, 1984, there is mention of a meeting with the worker on the 7th floor in which he again describes an accident on June 26, 1984, but does not mention the specific incident. In an interview with a Portuguese interviewer at the Board on August 27, 1984, the interview notes state that the worker advised that no sudden onset of pain occurred but that the pain occurred in a more gradual fashion. The worker told the Panel that he does not recall saying to the Portuguese interviewer that there was a gradual onset of pain. Indeed, on occasions both before and after the interview of August 27, 1984, the worker describes a specific incident. Had the worker started off with a description of a general onset of pain and then subsequently altered his description of the accident to refer to a specific incident, there might be grounds to question whether the story was being fabricated in order to establish a specific incident, which might, in the worker's mind, render entitlement more likely. However, where the worker has given general and specific versions of the happening of the event and has done so interchangeably, we conclude that the different versions are not evidence of fabrication but more likely either misinterpretation by the interviewers or different responses to different ways of being asked the question.

We do not wish to conclude this decision without making reference to the employer's conduct in this case. The employer was contacted by WCB by telephone on August 8, 1984, and advised the Board that the worker did not report the accident on June 26. The Board's investigator was able to contact a co-owner of the accident employer by telephone a few months after the incident. The co-owner denied that the worker had reported the incident to the foreman, Vince, on the day of the accident. The co-owner told the investigator that Vince is the father of the co-owner.

Subsequent attempts by the Board to contact Vince proved unsuccessful. On November 16, 1984, there is a memo in the file indicating that a Board investigator again spoke with the co-owner, Tony. Tony advised the investigator that he had spoken to both Vince and the co-worker, who by this time were working up north. He indicated that the co-worker did not see the worker get hurt. He further confirmed that he had been advised by Vincent that the worker did not report anything on the day of the accident.

The co-worker told the Panel that while he was up north, he had no conversations at all with Tony about the worker's incident of June 26, 1984. Accepting the co-worker's evidence as believable and credible, and noting the unsuccessful attempts of the Board to contact Vince raises a question about the credibility of the employer which leads to the conclusion that the worker may well have reported the incident to the accident employer on June 26, 1984.

What adds substantial weight to this proposition is Exhibit #3 which was filed at the hearing. The Appeals Tribunal attempted to summons to the hearing the co-owners of the accident employer and the foreman, Vincent. The Affidavit discloses some ten attempts to serve these people between February 27, 1986, and March 17, 1986. A reading of the Affidavit can lead to no other conclusion than that the employer personnel were attempting to evade service. Moreover, the Panel was advised at the commencement of the hearing that the Tribunal Counsel Office had contacted the employer on the morning of the hearing and had been advised by someone at the employer's place of business that they were aware of the hearing and would not attend.

Normally, the Tribunal draws no adverse inference from the failure of an employer to attend a worker appeal. In this case, we do draw such inference, and we conclude that where the employer evidence conflicts with that of the worker or co-worker, we reject the employer's evidence.

THE DECISION:

The appeal is allowed. This Panel concludes that the worker was involved in an incident on June 26, 1984, which resulted in a disability affecting his back. The panel leaves to the Board the determination of the amount and extent of benefits arising from the back disability.

There is evidence on file, and testimony from the worker, which would further indicate that in addition to injuring his lower back, he injured his neck and shoulders. We leave to the Board the issue of determining whether there should be entitlement for his neck and shoulder disabilities arising out of the same accident.

DATED at Toronto, this 4th day of April, 1986.

SIGNED: J. Thomas, D. Mason, B. Cook

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Workers' Compensation Appeals Tribunal

DECISION NO. 130

Tribunal d'appel des accidents du travail

Panel Chairman: N. Catton

Member: F. Jackson

Member: D. Jago



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

June 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 130

THE APPEALS PROCEDURE

The worker appeals a decision dated March 28, 1985, of the Appeals Adjudicator Mr. J.V. D'Andrea. This decision confirmed the decision of the Claims Review Branch dated September 19, 1984.

The appeal was heard on March 18, 1986, by a Panel of the Tribunal consisting of N. Catton, Panel Chairman, F. Jackson, a member of the Tribunal representative of worker's and D. Jago, a member of the Tribunal representative of employer's.

The worker attended the hearing and was represented by R. Tait of the Office of the Workers' Adviser. The employer was notified of the hearing but chose not to attend. The Panel was assisted by J.L. Marshall of the Tribunal Counsel Office.

The Panel read and considered the summary of facts contained in the Case Description as well as the documents attached. It also had before it the transcript of the previous hearing. The worker gave evidence under oath and was assisted in the Greek language by an interpreter. Submissions were made by Ms. Marshall and Ms. Tait.

THE ISSUE AND HOW IT ARISES

In late 1980 the worker began her employment as a tagging machine operator with the employer. The machine put price tags on articles of clothing. Many of the articles were small and she was commonly required to price several thousands of pieces of clothing each day. The machine was activated by pressing a button with the front of the second or middle finger of the right hand.

The worker experienced a gradual swelling of the second finger and so she eventually switched to using her middle finger when operating the machine. Ultimately her fingers became completely stiff and remained painful. In the summer of 1983, she terminated her employment.

The worker claims that this work activity caused a disability in her fingers diagnosed as arthritis. It is also her contention that she is no longer able to work because of this condition.

The claim was rejected by the Appeals Adjudicator because he found that the disabling condition was arthritis which was not related to the employment. The Adjudicator based this decision on the advice of the Board's surgical consultant.

In reaching a decision on this case, the Panel must assess the causal relationship between the disability and the work performed. If the disability was solely attributable to a pre-existing condition there would be no compensation payable. If the employment activities aggravated an underlying condition compensation benefits would be payable.

THE PANEL'S REASONING:

At the hearing the worker's representative argued that the worker's condition diagnosed as arthritis was caused and not aggravated by the work. However, there are medical reports on file particularly from Dr. D.D. Gladman, who specializes in internal medicine and rheumatology which state that the worker is suffering from psoriatic arthritis which is widespread. The doctor indicated that the psoriasis has existed for about 20 years.

When questioned at the hearing about this evidence, the worker testified that she had had a few episodes of psoriasis over the years but these bouts had been insignificant. She also advised the Panel that she had appointments with a skin specialist after her layoff from work, however, the real purpose of these appointments was just to drop in and say hello to the doctor.

It is apparent to the Panel that the worker was not credible in describing the extent of her pre-existing disability. The documentation available to the Panel, makes it clear that when the worker stopped working in 1983 she was admitted to the psoriasis clinic at Women's College Hospital in Toronto. She was again treated at the clinic in January, 1984, April, 1984, and August, 1984. The extent of the treatment indicates to the Panel that the condition was serious. She also failed to acknowledge any sort of active treatment for the condition. The Panel does not accept that a medical specialist would arrange appointments for the purpose of casual conversation. The Panel therefore finds that the worker had a significant underlying pre-existing condition.

The next issue for the Panel to decide is whether or not the work aggravated this underlying condition. The worker's description of the job was verified by the Board investigator who visited the workplace.

To assist the Panel there are opinions from three doctors, Dr. Teskey, Dr. Hernando, and Dr. Gladman.

In analyzing this evidence the Panel first referred to the opinion of Dr. Teskey, who is employed by the WCB. In a memo to the Claims Department, Dr. Teskey wrote:

"Noting job description I do not feel this job would aggravate arthritis to any extent more than any activity. Therefore, I would recommend denying claim."

Clearly the worker was using her fingers more while performing her job than an average individual. The Panel does recognize that the work did not require excessive force or strength when pushing the button. In the Panel's opinion, because Dr. Teskey's analysis fails to address the repetitive use of the fingers, it is of little benefit in assessing an aggravation claim.

Dr. Hernando is the family physician, and he reported that the condition was work-related. The Panel has some difficulty in accepting Dr. Hernando's opinion because he appears to have based his opinion in part on evidence contained in a pre-employment medical check-up. The employer in a letter to the Board dated June 13, 1984, indicated that the company had never conducted pre-employment medical examinations. No documentation to confirm the pre-employment examination

was made available to the Panel. The Panel is also concerned that Dr. Hernando failed to provide the Board with any evidence concerning the psoriasis, although according to the worker, he arranged the referral to Dr. Gladman and to the psoriasis clinic. The Panel is therefore not prepared to place significant weight on this opinion.

The final piece of medical evidence comes from Dr. Gladman, a specialist in the field. The doctor has acknowledged the problem of active arthritis in a number of joints other than the fingers. However, what is significant to this case is the following passage from Dr. Gladman's report:

".... its quite likely that at least the second and third fingers have progressed a lot more rapidly than the rest of her arthritis because of her activities as a machinist."

The Panel does accept this opinion because it is clear that this qualified specialist had a complete understanding of the facts and history.

The Panel finds that the work performed between 1980 and 1983 caused abnormal use of the second and third fingers on the right hand and that this work activity is reasonably considered an accident defined as disablement arising out of and in the course of employment. The Panel also finds that the underlying condition namely psoriatic arthritis in the two fingers was accelerated by the work activity. The worker has therefore suffered a disability which can be related to her work.

During its consideration the Panel also considered whether the worker's disability was permanent or temporary. There does not appear to be any evidence that the worker's condition has changed since her lay off in 1983, nor is there any indication that further treatment is contemplated for the condition. It would therefore appear that by the time the worker laid off in 1983, her condition in the two fingers was permanent. These comments are made by the Panel to assist the Board in its adjudication of the claim.

DECISION

The appeal is allowed. The Board is directed to assess any benefits that might flow from the recognition of the disability in the second and third fingers of the worker's right hand.

DATED at Toronto this 17th day of June, 1986.

SIGNED: N. Catton, F. Jackson, D. Jago.



Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

CAZAN
L95
- D21

DECISION NO. 131

Panel Chairman: I. Strachan

Member: S. Fox

Member: K. Preston



June 1986

RESEARCH AND PUBLICATIONS DEPARTMENT

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 131

THE APPEAL PROCEDURE

The worker requests leave to appeal, pursuant to section 86o(3)(b) of the Workers' Compensation Act, as amended ("the Act"), with respect to the decision of the WCB Appeal Board dated May 22, 1985. The Appeal Board denied the worker's entitlement to benefits for calluses on his right foot on the grounds that the calluses did not result from his employment as a security guard.

The application for leave to appeal was heard on March 18, 1986, by a Panel of the Appeals Tribunal consisting of I.J. Strachan, Panel Chairman, S. Fox, a member of the Tribunal representative of workers, and K. Preston, a member of the Tribunal representative of employers (the "Panel").

The worker attended at the hearing and was represented by M. Endicott. The employer was not represented at the hearing. The Tribunal was assisted by R. Nairn, a member of the Tribunal Counsel Office.

The Panel examined the description of the case prepared by the Tribunal Counsel Office, accepted by the worker and marked as an Exhibit at the hearing. In addition the Panel heard the testimony of the worker under oath and submissions by the worker's representative and Tribunal counsel.

The worker's representative conceded that there was no substantial new evidence before the Tribunal and accordingly the application for leave was made under section 86o(3)(b) of the Act which reads as follows:

"Leave to appeal a decision to which subsection (2) applies shall not be granted unless,

(a)

(b) there appears to the Appeals Tribunal to be good reason to doubt the correctness of the decision."

BACKGROUND

The worker was employed as a security guard by the employer for the period October 25, 1980, to April 27, 1984, at which time his employment was terminated. Prior to that time, he had worked from 1943 to 1963 as a heavy press operator - a position which involved standing for approximately 40 hours per week. In 1963 he commenced employment as a security guard with another firm and maintained that position until 1979 when he retired. The worker testified that, prior to commencing his new security guard employment in 1980, he also walked 8 miles per day for exercise and his feet were in good condition. He noted that Dr. Dekany had removed a callus from his right foot prior to 1980 and that he had not experienced trouble with his feet after the removal of his callus.

Apparently in the fall of 1983, the worker began to experience pain with his right foot and in November, 1983, the pain became sufficiently severe that the worker sought medical attention. He was seen by Dr. Dekany on November 10, 1983, and his pain was linked to a right second hammer toe and calluses. Although the worker continued to work, he did miss time from November 14, 1983, to November 19, 1983, and from January 13, 1984, to January 20, 1984, as a result of foot pain. On April 27, 1984, his employment was terminated. During his employment, his primary duty was security guard at a hospital. This involved standing on his feet for the better part of his eight hour shift.

Evidence indicated that the worker had supplied his own shoes and was not reimbursed by the employer for the shoes. He was not required to wear any type of special footwear in accordance with any employment regulations, although there is some indication that the employer insisted upon black footwear.

The worker has claimed entitlement to compensation benefits for lost wages and medical aid expenses.

In arguing that leave should be granted, the worker's representative argued that the Tribunal should doubt the correctness of the Appeal Board decision because that Board:

- (a) ignored the preponderance of medical evidence which supported the worker's position;
- (b) relied upon certain misinformation in reaching its decision, and
- (c) relied upon a WCB guideline which was inappropriate.

With respect to the medical evidence, the worker representative relied upon a series of medical reports which indicated that the worker's duties as a security guard could result in a greater inclination to develop calluses from pressure and friction. In addition the worker filed a series of medical articles with the Tribunal relating to occupational calluses and their cause and treatment.

Insofar as the only available medical evidence supported the proposition that the on-going pressure resulting from constant standing on the job caused calluses on the workers right foot, it is the worker's submission that the Appeal Board did not adequately consider the evidence and opinions before it. There were no specific opinions from WCB doctors or consultants refuting the claim.

The worker's representative also pointed out that the Appeal Board had relied upon certain misinformation since it had concluded that the worker had a callus removed from his foot in 1983 when he was in the habit of walking eight miles per day. Evidence in the Case Description indicated that the callus was removed in 1980 prior to his employment and that he was not in the habit of walking eight miles per day after commencing employment in 1980.

In addition the worker claimed that the Board guidelines on infected blisters, which have been extended to infected calluses, does not carry out the spirit and intent of the legislation. It was submitted that both the Board and its policy treated footwear in isolation instead of relating the footwear to the worker's job.

THE PANEL'S REASONING

1. Reason to Doubt the Correctness of the Decision

(A) Merits of the Appeal Board Decision

It was urged upon the Tribunal by the worker's representative that the Tribunal should find there was good reason to doubt the correctness of the Appeal Board decision, since the preponderance of evidence produced throughout favoured the worker.

In considering an application for leave to appeal, it is not sufficient merely that the Tribunal would have reached a different conclusion from that of the Appeal Board based upon a balance of probabilities. Obviously it is in the public interest that some finality exist in the compensation decision-making process. No legal or administrative body could function efficiently if it were subjected to an eternal tide of recycled appeals under a general power to reconsider past decisions. At some point there must be an end.

It is also in the public interest that contentious issues be finally resolved to permit the parties to channel their energies in more constructive areas than on-going compensation processes.

There may be a number of situations in which the Tribunal will find there exists good reason to doubt the correctness of a decision. The following represents some which come to mind:

1. A clear error of law on the face of the record (eg. application of policy which is inconsistent with the legislation.);
2. An error with respect to an important fact which error is clear from the record.
3. Absence of any evidence to support the finding in the earlier decision.
4. An obvious oversight with respect to certain critical evidence (as contrasted with considering and rejecting such evidence).

The above list is not exhaustive; it is merely intended to demonstrate that it is not enough that the Tribunal would have reached a different conclusion had it heard the case in the first instance. That alone is not sufficient to justify interference with the intended finality of the earlier process. Leave to appeal based solely upon reconsideration of the merits of the case ought not to be granted.

In the case before the Tribunal, the Panel may well have reached a different conclusion based upon the evidence. However, that alone is not sufficient to disturb the decision of the Appeals Adjudicator and the Appeal Board. The medical evidence before the Appeal Board was not definitive of the issue - the failure of the worker's foot problem to resolve itself after 18 months of inactivity and the deterioration of his problem to the point where the worker now requires weekly attention for his calluses, combine to suggest that the callus problem may not have been related to his employment.

(B) WCB Policy or Guideline

During its seventy years of existence, the WCB has developed a number of policies, directions and guidelines with respect to the interpretation of the Act which are essential if the Board is to deal with the tremendous volume of claims filed. Four hundred thousand accidents per annum demand the creation and application of specific, written, policies and guidelines derived from the legislation. It is not for the Tribunal to arbitrarily criticize a policy or guideline simply because the Tribunal concludes that a different policy might be more appropriate.

However, where a policy or guideline, in seeking to interpret and apply a section of the Act, in the Appeals Tribunal's opinion derogates from the intent of the legislation, that policy or guideline cannot be upheld.

In the case before the Tribunal, the WCB guideline focuses on the responsibility for the selection and purchase of footwear. That guideline reads as follows:

2. Infected blisters (calluses) caused by footwear worn at work:

- (a) When the worker supplies the footwear or is free to choose where the footwear is to be purchased, whether or not the employer subsidizes the purchase in whole or in part, it is the worker's responsibility for the efficiency of the footwear and a claim would not have merit.
- (b) If the footwear is provided by the employer, or the worker is directed by the employer to purchase the footwear at some specific place of business, and the employer subsidizes the purchase in whole or in part, then a claim for infected blisters (calluses) may have merit.

While there is an obvious common sense basis for this guideline (ie. the purchase or selection of totally unsuitable footwear may contribute to the onset or severity of an injury), the doctrine of "contributory negligence" is not a concept to be encouraged in the worker's compensation system.

As part of the 1915 "trade off" embodied in the original Workmens' Compensation Act, employees gave up their rights of action against employers for accidents at work and in return received a right to compensation from the WCB. As part of this agreement, employers gave up certain common law defences to employees' claims, including the doctrines of voluntary assumption of risk and contributory negligence.

While the imprudent selection of improper footwear, loose fitting clothing or unusually high heels may act in combination with some aspect of the employment to cause blisters, lacerated arms and twisted ankles respectively, the lack of foresight on the part of the worker in donning such inappropriate attire should not override the "no fault" principle upon which compensation law in the Province of Ontario is founded. The no fault principle is paramount and any encroachment upon this principle must be scrutinized. If the blisters arose out of some aspect of the employment, a disability resulting from the blisters would be compensable,

regardless of the fact that inappropriate footwear may also have been a contributing cause.

(C) Factual Findings Not Supported By The Evidence

In arriving at a decision that the callus on the worker's foot did not arise out of his employment as a security guard, the Appeal Board made note of five factors. Factor number 1 was the employment of the worker as a security guard from October, 1980. Factor number 5 was a conclusion that the "benefit of doubt does not apply".

With respect to the remaining three factors which formed the basis for the Appeal Board decision, the Tribunal noted the following:

Factor No.2

Factor number two on page 2 of the Appeal Board decision is stated as follows:

"That (the worker) ... had a callus removed in 1983 when he was in the habit of walking 8 miles per day."

The worker's testimony before the Tribunal, the decision of the Appeals Adjudicator and the transcript of evidence before the Appeal Board (page 10, question 2) indicate that the callus in question was removed in 1980 - prior to commencement of employment with the security firm and the posting to the hospital.

In addition the evidence indicated that the worker's habit of walking eight miles per day related only to the period prior to commencement of employment with the security firm. The worker was not in the habit of walking eight miles per day following commencement of employment in 1980.

Factor No.3

"The opinion of the Board's Medical Branch to the effect that the problems ... (the worker) ... was experiencing with calluses on his right foot were not related to his employment as a security guard."

This "opinion of the Board's Medical Branch" is set out in Memo #6A of the WCB correspondence and takes the form of a two-word opinion - ie. "deny claim". No explanation is given for the conclusion the Medical Branch arrives at. There is no evidence that the worker was examined by a WCB doctor; nor is any reasoning obvious with respect to the relationship between the worker's foot problem and his employment. While the Appeal Board may have accepted the opinion of the Board's Medical Branch, it appears to have done so on faith alone and not upon the basis of any reasoned medical opinion. The opinion offered is an adjudicative opinion, not a medical opinion.

Factor No.4:

The Appeal Board noted and accepted the Board policy or guideline relating to the purchase of footwear. On page two of its decision the Appeal Board states:

"The Appeal Board notes and accepts:

- the Board policy which states: "... when the worker supplies the footwear or is free to choose where the footwear is to be purchased, whether or not the employer subsidizes the purchase in whole or in part, it is the worker's responsibility for the efficiency of the footwear and a claim would not have merit ..."

The Appeal Board finds no reason to deviate from Board policy
... "

In accepting the policy, the Appeal Board did not determine whether (a) the footwear alone caused the problem, or (b) whether some aspect of the employment caused the problem.

In applying the Board policy without determining that the footwear alone caused the problem (ie. unassisted by some aspect of the employment relationship), the Appeal Board in essence adopted the doctrine of contributory negligence as an absolute bar to compensation. This conflicts with the no-fault principle which is paramount in the worker's compensation system.

2. Conclusions

The Tribunal finds that the following reasons exist for doubting the correctness of the Appeal Board decision:

1. Factor No.2 indicates that the Appeal Board had accepted certain misinformation regarding the removal of the callus when the worker was in the habit of walking eight miles per day. The Appeal Board was obviously under the impression that this callus was removed and that the worker was engaged in lengthy walks during the course of his employment in 1983. In fact both incidents, the callus removal and the walking regime, took place prior to commencement of his employment in 1980.
2. The opinion of the Board's Medical Branch consists of a two-word opinion which, in the opinion of this Tribunal, is not a medical opinion. The opinion contains no discussion of the injury or its probable cause; the decision of the branch (ie. "deny claim") is, in essence, an adjudicative decision and not a medical one.
3. The Appeal Board, in following the WCB guideline with respect to the purchase of footwear without first determining that the footwear alone caused the problem, has re-introduced the doctrine of contributory negligence which in turn conflicts with the general no-fault principle enshrined in the Act. In the opinion of the Tribunal, the paramouncy of the "no-fault" doctrine must be upheld and accordingly the Appeal Board's application of the guideline violates the intent and purpose of the legislation.

We have concluded that the above reasons to doubt the correctness of the decision exist. Section 86o(3)(b) requires, however, that there be a good reason to doubt the correctness of the decision. Although there may be errors in a decision, the Tribunal could nonetheless find, on the basis of all the evidence that it does not have good reason to doubt the correctness of the decision. In

this case, however, the nature of the reasons which exist for doubting the correctness of the decision, as outlined above, taken together, led us to conclude that, overall, there is good reason to doubt the correctness of the Appeals Board decision. Our decision does not mean that the Appeals Board decision was wrong. There is some evidence on file which supports the Appeals Board decision. That evidence is, however, not sufficiently complete or persuasive for us to conclude that we do not have good reason to doubt the correctness of the decision.

A new hearing will be held so that there can be a decision after a full hearing of all the evidence.

In view of the above findings, the Tribunal is of the opinion that good reason to doubt the correctness of the Appeal Board's decision exists and a new hearing should be held to permit full evaluation of the evidence.

DECISION

Leave to appeal is hereby granted.

DATED at Toronto, this 16th day of June, 1986.

SIGNED: I.J. Strachan, S. Fox.

MINORITY DECISION

Having read the reasoning of the majority of the Panel, I am unable to concur in the decision to allow the leave to appeal. Upon reviewing the testimony of the injured worker and the evidence in the Case Description, there does not appear to be good reason to doubt the correctness of the decision. While the Board may have considered information and internal policies or guidelines which were incorrect or of limited value, their decision based on the total evidence was that the calluses on the right foot did not arise out of his employment.

Information before the Tribunal was that the worker had a callus removed in 1980, which was prior to his employment as a security guard, and that he continued to suffer from calluses after some eighteen months of inactivity following his release from the position of a security guard.

Medical evidence which supports the correctness of the Board's decision contained in the Case Description includes an article entitled, "The Palms and Soles in Medicine" by Maurice J. Costello, M.D., FACP, Professor of Clinical Dermatology New York University Medical Centre and Richard C. Gibbs M.D., Assistant Clinical Professor of Dermatology New York University Medical Centre, which states at Page 46:

"Calluses may be separated into those of occupational and non-occupational origin. Among the occupational calluses are those encountered among athletes. An example of a non-occupational callus is the plantar callus that so frequently plagues modern women."

Other evidence that supports the correctness of the Board's decision is contained in a letter on the worker's WCB file by an orthopaedic surgeon dated April 25, 1985 who states:

"I have seen the worker in consultation with regard to difficulty with plantar calluses.

...
This is a life long problem"

SIGNED: K.W. Preston

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Workers' Compensation Appeals Tribunal

DECISION NO. 134

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: D. Mason

Member: B. Cook



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 134

THE APPEAL PROCEDURE

This is a worker appeal of the April 2, 1984, decision of Mr. W.A. Paavola, Appeals Adjudicator.

The appeal was heard in Timmins on March 20, 1986, by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, B. Cook, a member of the Tribunal representative of workers, and D. Mason, a member of the Tribunal representative of employers.

The worker appeared and presented his case without representation. The employer did not attend the hearing. The Panel was assisted by Ms. Patricia Auron, a member of the Tribunal Counsel Office.

The Panel had before it the relevant portions of the Workers' Compensation Board file. The worker gave oral testimony under oath and was questioned by members of the Panel and Ms. Auron.

THE ISSUE AND HOW IT ARISES

The Panel confirmed with the worker that the issue before the Tribunal was the appropriate level of workers' compensation benefits for the period April 7, 1980, to April 6, 1981. The Appeals Adjudicator ruled that the worker was entitled only to the 50% benefits which the worker had been granted by the board for this period. The worker asks that he be granted entitlement to 100% benefits pursuant to S.41.(1)(b) as it then read.

The relevant portion of the Appeals Adjudicator decision reads as follows:

"The totality of medical evidence on file supports that the worker was not totally disabled from employment April 7, 1980, to April 6, 1981 and that he was capable of returning to suitable employment during that interval. The worker made no approach to the Board during that interval of time for rehabilitation assistance. According to the letter on file with regard to employment contacts, he visited some 25 places for employment. There is no indication that he asked for the Board's assistance in getting into the machinists trade in that interval. It is quite apparent that although the worker was capable of returning to employment of a suitable nature between April 7, 1980 and April 6, 1981, he made very little effort to do so. The Adjudicator concludes that the worker is not entitled to temporary total compensation benefits for the period April 7, 1980, to April 6, 1981 and the payment of temporary partial compensation 50% during this interval of time is confirmed..."

THE PANEL'S REASONING

The worker suffered an injury to his left hand on November 12, 1979, while in the course of his employment as a line cutter and a member of a geophysical team. Much of his work involved cutting lines through the bush with an axe and a long knife. His injury was caused when he hit his hand with the axe while trying to cut a branch. The injury involved a cut and damage to the tendon.

Following the injury the worker returned to his home town in northern Quebec. An operation was performed on January 25, 1980, by Dr. D., a specialist in Montreal, following which the worker was placed in a cast for some five weeks. The doctor predicted that the worker would go on to complete recovery within 10 weeks of the operation. Dr. D. reviewed the worker on March 25, and suggested that he ought to be able to return to work on April 7, 1980.

On the basis of this report the WCB closed the worker's claim as of April 7, 1980, as it was determined that he had no further entitlement.

The worker, however, did not return to work as he believed he continued to have a disability which prevented him from performing his regular job in the bush. The worker was reviewed by Dr. D., in May and in a report dated May 14, 1980, she stated:

"I am of the opinion that the patient has little motivation to return to his work and he is not sufficiently active. I believe his function is adequate for him to work and he must be feeling that he is probably not recovering complete suppleness. However, he is not disabled from work. I suggest that he be seen if necessary by your rating team to settle this claim on a final basis."

Around this time the worker began to see Dr. R., a local family physician. Dr. R. filed a number of reports with the Workers' Compensation Board over the period under appeal, with respect to the worker's ability to work. These reports are rather contradictory. On May 20, 1980, he said that the worker was unable to work. On August 6, 1980, however, he reported that he now agreed with Dr. D. that the worker could work and suggested that the worker was "lazy". The next month he sent a report asking that rehabilitation assistance be provided to the worker, and then in October, he found the worker to be unfit for work. In November, 1980, Dr. R. decided that the worker ought to be seen by a second specialist and an appointment was finally arranged for December 5, 1980. At that time, the second specialist decided that further surgery should be performed to correct a deformity in the worker's thumb. Due to a delay in obtaining a hospital bed, this operation was not performed until April, 1981, at which point, the WCB reinstated temporary total benefits.

The worker has subsequently gone on to have two further operations. He has been left with a permanent disability which the WCB has assessed at 4%.

Throughout the period April, 1980, to April, 1981, the WCB continued to rely on the opinion of the first specialist Dr. D., given in March, 1980, to the effect that the worker would be capable of performing his regular job as of April 7, 1980.

In June, 1981, after the surgery performed by the second specialist, the Board concluded that the worker had a partial disability prior to that surgery. For reasons which are not clear to the Panel, the Board initially decided to grant partial benefits for the period December 5, 1980, the date that the worker was seen by the second specialist, until April 6, 1981, when benefits were reinstated because of the second operation. It was not until April, 1982, that the Board agreed that the worker had been incapable of returning to his pre-accident job for the entire period, April, 1980, to April, 1981, and that he had therefore had a partial disability for the entire period of time.

On both occasions when entitlement was retroactively restored, first for the period December 5, 1980, to April 6, 1981, and secondly for the period April 7, to December 5, 1980, the worker was only granted 50% benefits.

The relevant portion of Section 41, as it then read states that: "where temporary partial disability results from the injury, the compensation shall be in the same amount as would be payable if the worker were temporarily totally disabled (i.e. 100% benefits) unless the worker

- "(i) fails to cooperate in or is not available for a medical or vocational rehabilitation program which would, in the board's opinion, aid in getting him back to work and in lessening or removing any handicap resulting from his injuries, or
- (ii) fails to accept or is not available for employment which is available in which in the opinion of the Board is suitable for his capabilities."

It would appear that it was not until the summer of 1982, considerably after the period in question, that the Board attempted to determine whether the worker was disqualified from receiving 100% benefits for one of the reasons noted above.

In June, 1982, the worker wrote to the WCB and stated that he had been attempting to find suitable employment for the period April, 1980, to April, 1981. The worker attached to his letter a list of some 25 employers who he had contacted. The worker noted that he had contacted other employers but that the list of 25 represented the contacts that he could remember at that point.

In August, 1982, the WCB sent out an investigator who talked to the worker and contacted some of the employers on the worker's list. Not surprisingly, due to the length of time which had elapsed most of the employers had no record of the worker's contact. Indeed, most employers contacted by the investigator advised that they did not keep job applications more than a month.

At the hearing before this Panel the relevant testimony of the worker with respect to his situation during the period under appeal, was that he was firstly in receipt of conflicting medical advice and secondly, that he was attempting to find suitable employment.

With respect to the medical evidence, there is no question that the worker received conflicting instructions. The Panel agrees with the Appeals Adjudicator that the medical evidence does not establish that the worker was totally disabled during the period in question. We are further completely satisfied that the worker was not capable of performing his pre-accident job nor, likely, any job which would have required the extensive use of his left hand. We note that the worker has had a number of operations and has been left with a definite permanent disability.

For the period under appeal therefore, the Panel is satisfied that the worker had a temporary partial disability.

In terms of the worker's attempts to find suitable employment during the period under appeal, the worker testified that he registered with Canada Manpower and visited their offices on several occasions. He also said that he contacted a number of employers in an attempt to find work. The Panel notes that the worker was not advised until two years after the fact that a job search list would be helpful to his case. The worker also noted and the Panel accepts, that there is a high unemployment rate in the area where the worker lives.

The Panel accepts the worker's evidence and concludes that the worker made a reasonable effort to find suitable work during the period under appeal. The worker cannot, therefore, be disqualified from receiving 100% benefits pursuant to S.41 on this basis.

We are also of the view that the worker ought not to be disqualified from receiving 100% benefits on the grounds that he failed to approach the Board during the interval of time for rehabilitation assistance, since at the time the worker had no entitlement and would therefore have been ineligible for rehabilitation assistance. The worker cannot be disqualified for failing to cooperate in or be available for a rehabilitation program which was not available to him.

There is further no evidence that the worker failed to accept or made himself unavailable for available and suitable employment.

DECISION

1. The appeal is allowed.
2. The worker is found to have had a temporary partial disability for the period April 7, 1980, to April 6, 1981.
3. The worker was entitled to 100% benefits during this period and the Board is directed to so pay the worker.

DATED at Toronto this 2nd day of April, 1986.

SIGNED: J. Thomas, B. Cook, D. Mason

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Workers' Compensation Appeals Tribunal

DECISION NO. 136

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: B. Cook

Member: D. Mason



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 136

THE APPEAL PROCEDURE:

The worker appeals the October 11, 1978, decision of the Workers' Compensation Board Appeals Adjudicator J. D'Andrea.

The appeal was heard in Timmins on March 20, 1986, by a panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, B. Cook, a member of the Tribunal representative of workers, and D. Mason, a member of the Tribunal representative of employers.

The worker appeared and was represented by Mr. G. Renaud, solicitor. The employer did not attend the hearing. Ms. Aquino interpreted in the French language.

The Panel had before it the Case Description materials which were marked as an exhibit at the hearing. The worker gave oral testimony under oath and was questioned by Mr. Renaud and members of the Panel. Submissions were made by Mr. Renaud.

THE ISSUE AND HOW IT ARISES:

The worker seeks to establish entitlement for a disability affecting both wrists. The worker states that the wrist disability was caused by repetitive movements which he performed first as a miner between 1941 and 1954 and latterly as a plumber between 1954 and 1972. It is alleged by the worker that his mining work contributed to his wrist disability in that he was required to break up large rocks with a hammer, and that his plumbing work required repetitive wrist motion in the operation of a threading machine.

THE PANEL'S REASONING:

The Appeals Adjudicator indicated that the worker had failed to establish a relationship between his wrist disability and his employment. In reaching this conclusion, Mr. D'Andrea relied upon a memo from a Surgical Consultant which, in our view, fairly accurately summarized the competing medical theories as to the cause of the worker's wrist problems. One theory, put forward by Dr. M. at Toronto General Hospital in a report dated November 25, 1972, suggested that the source of the problem might be bilateral ulnar nerve lesions. This would be a localized wrist problem. The other theory suggested by Dr. S., in notes transcribed on January 7, 1974, indicate that he worker was experiencing problems with his cervical spine and a diagnosis was made of cervical spondylosis with spinal cord compression. Ultimately, the worker underwent a laminectomy and decompression of the spinal cord in 1974 but advised the Panel that this operation did not help his wrist symptoms.

The Surgical Consultant found that he was unable to choose between the two explanations offered by Dr. M. and Dr. S. but decided that, regardless of the correct explanation, neither would result in compensation because neither condition resulted from his employment. Mr. D'Andrea accepted the Surgical Consultant's view on this matter and accordingly denied the appeal.

A number of years have passed since the Appeals Adjudicator decision. Additional medical reports have been received. In a report dated February 20, 1985, Dr. O. concluded that the worker has bilateral arthritis of the wrist joints. On April 1, 1985, Dr. M., a neurologist attributed the wasting in the worker's wrists to arthritic changes. There is some evidence in the file to indicate that as of December 5, 1977, before the Appeals Adjudicator Hearing, Dr. O. had put on record a diagnosis of osteoarthritis. In Dr. O's memo he stated that the arthritis is not work related. It would appear that the Appeals Adjudicator did not consider or comment on this third possible explanation for the worker's problems.

The worker was unable to explain to the Panel what exactly it was about his jobs as a miner or plumber that would have given rise to his wrist disability. In the Panel's opinion, the worker is a most sincere individual who simply could not recall or describe his job situations. What little information the Panel was able to obtain from the worker after questioning of the worker by Mr. Renaud and by all members of the Panel falls far short of establishing anything in the way of a repetitive motion involving rotation of the wrists in a way that could possibly have caused a nerve lesion. Similarly, the worker was unable to give any specific information, nor is there anything on file to establish a relationship between cervical spine problems and his employment. Nor is there any indication that the nature of the work or the environment in which the worker was employed would have caused or contributed to an arthritic condition. Therefore, regardless of which of the possible medical explanations correctly explains the reason for the worker's wrist disability, there is nothing in the Case Description or in the worker's testimony upon which this Panel can establish a causal relationship between any of the possible theories and the worker's employment as a miner or plumber.

On behalf of the worker, Mr. Renaud suggested that there was an onus on the Board to have investigated the relationship between the worker's employment and the possible medical theories more carefully and that this Tribunal, if it could not establish a link between the worker's employment and any of the medical conditions, ought to embark on further investigations to attempt to establish such a relationship. We respectfully decline to do so on the particular facts of this case. There is no indication that the worker would be able to provide a physician with a better history than has been given to this Panel to assist in establishing a causal relationship. Moreover, the Tribunal believes that the determination of entitlement is a legal determination which ought to be done by the Panel hearing the case and not by a physician. There is no doubt that medical assistance is often required in attempting to establish a causal relationship, but in the final analysis, it is the responsibility of the Panel to make the legal determinations. In this case, we have not been able to obtain from the worker enough history to suggest that further medical exploration would likely disclose a relationship between the disability and the employment.

Mr. Renaud also suggested that once it has been established that the worker was involved in repetitive motion activities, an application of the presumption clause and the benefit of doubt acts in the worker's favour and the onus shifts to the employer to establish that the disability is not work related.

We respectfully do not agree. For a disability to be work related, there must be evidence that satisfies the Tribunal that the disablement arose out of and in the course of employment. According to the Case Description materials, the worker's wrist problems occurred at about the time that he ceased his employment as a plumber. If we were to apply the presumption clause as suggested by the worker's representative, any evidence of a repetitive activity would shift the onus off the worker. We are of the view that a causal relationship between the nature of the work and the disability must be established by the worker. This requires the offering of evidence about the type of work performed in sufficient detail to establish the relationship between the worker's movements and his disability. The mere statement of involvement in repetitive activities does not automatically trigger the presumption clause. In this case, we conclude that such a relationship has not been established.

DECISION:

The appeal is denied.

DATED at Toronto, this 4th day of April, 1986.

SIGNED: J. Thomas, B. Cook, D. Mason

CASAN
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- D21

Workers' Compensation Appeals Tribunal

DECISION NO. 139

Tribunal d'appel des accidents du travail

Panel Chairman: I. Strachan

Member: S. Fox

Member: D. Jago



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKER'S COMPENSATION APPEALS TRIBUNAL

DECISION NO. 139

THE APPEALS PROCEDURE:

The worker appeals the January 4, 1985, decision of the Workers' Compensation Board Appeals Adjudicator J.V. D'Andrea denying the worker's claim for compensation arising from injuries to his knees in the early 1960's.

The Appeal was heard on March 21, 1986, by a Panel of the Appeals Tribunal consisting of I. Strachan, Panel Chairman, S. Fox, a member of the Tribunal representative of workers, and D. Jago, a member of the Tribunal representative of employers (the "Tribunal").

The worker appeared and was represented by M. Falco, a worker's adviser from the WCB Workers' Advisers Office. The employer company ceased operations in Canada in August 1980, and was not represented at the hearing. The Tribunal was assisted by G. Dee a member of the Tribunal Counsel Office.

The Tribunal heard and considered the testimony of the worker given under oath and read the relevant forms, memoranda, reports, statements of fellow-workers and medical reports extracted from the WCB file and collected in the Case Description Materials. The Case Description Materials were accepted by the worker's representative and filed as Exhibit #1. The Tribunal also read additional submissions tendered by the worker's representative and filed as Exhibit #2.

THE ISSUES AND HOW THEY ARISE:

The worker was employed by the employer from 1956 to 1980 in various supervisory capacities. This company ceased operations in Canada in August 1980.

In October 1980, while employed by another employer, the worker claimed entitlement to benefits for injuries to his knees suffered in the early 1960's. He stated that the injuries initially resulted from an accident when he was jammed between two sets of pallets. Several years later he fell from a metal staircase while at work and suffered a large hematoma on his left knee.

The worker testified he had reported the injuries to his employer, but no claims for compensation benefits were filed because the employer had a policy, restricted to its supervisory staff, of retaining injured supervisors on full salary when they lost time from injuries. All medications and other costs were covered by a Group Insurance Plan. In addition, the worker received an additional \$50. for the "hurt". Efforts were made to secure accident records from the employer's main office in Buffalo, New York; however all pre-1975 First Aid records had been destroyed.

The worker underwent a meniscectomy operation (removal of cartilage) on his left knee in 1964. Attempts to locate hospital records for this period were also unsuccessful, except for a record dated September 30, 1964, confirming the meniscectomy.

A March 1972, arthroscopic examination of the left knee noted evidence of arthritic change at the patella femur joint compatible with degenerative arthritis. In November 1973, Dr. Fang, an orthopaedic surgeon, performed a total patellectomy to the left knee (removal of knee cap).

The worker has continued to be troubled with problems in both knees up to the present time. Records of his family doctors from 1964 show continued treatment for a number of ailments connected with his knees. In August 1979, his surgeon stated that the worker suffered from early osteoarthritis of both knees periodically requiring anti-inflammatory medication as well as joint steroid injections.

The worker was described, both before and after his patellectomy, as a very active individual both at work and in various activities including skiing, skating and dancing. The Oshawa General Hospital Patient History Report of 1974 states that the worker was involved in a skiing accident and injured his right knee in 1970. Although the worker testified that he had many falls, he could not remember a specific skiing injury. He denied the specific skiing injury in 1970 which was referred to in Dr. Fang's report. The worker continued to pursue his interest in downhill skiing throughout the 1970's and 1980's and indicated that, although Dr. Fang had recommended he not ski, Dr. Charlie Bull, a consultant to the hockey players on Team Canada, advised the worker that he could still ski. The worker indicated that he had undergone arthroscopic surgery on his right knee in 1985 to trim some of the cartilage.

The worker's claim for entitlement in 1980 was examined by the Claims Review Branch in November 1981, and disallowed on the basis there was "no proof of accident in the employment to account for the knee disabilities". An appeal to the Appeals Adjudicator resulted in denial of entitlement on the basis there was insufficient proof to establish the worker suffered injury "by accident arising out of and in the course of his employment with the employer which gave rise to his bilateral knee disability".

THE PANEL'S REASONING:

The evidence presented during the hearing, supplemented by letters from two fellow workers, was substantially the same as that offered in prior appeals. There remain large gaps in documentation covering vital incidents. The worker indicated that, as part of the management group, he remained on full salary on those occasions when he lost time from work due to injuries. The group insurance plan covered all medication and appliances. The explanation for this policy offered by the worker was the dangerous assessment position of the accident employer resulting from a high accident rate. This resulted in the employer not reporting injuries to the Workers' Compensation Board and the injured worker remaining on full salary during the disability. With respect to those WCB claims for the worker which were on file with the Board (ie. the August 13, 1976, claim for a foot injury and the August 31, 1978, for a left hand injury), the worker suggested that these claims may have been filed by his family doctor. The doctor did not file claims for the earlier injuries.

A request from the WCB to the employer for information on injuries related to the worker received the following response in a letter dated October 15, 1981:

"Our review indicates no record of any disability or accident report in his personal file that encompassed the period of November 5, 1956, to June 27, 1980".

Records of medical and hospital treatments also reveal large gaps. The Oshawa General Hospital did not maintain records for longer than 20 years. Bomanville Memorial Hospital physiotherapy records do not date back to 1961 and the Oshawa Clinic does not maintain physiotherapy records for more than 7 years.

The Industrial Relations Manager of the employer indicated in an interview that he was aware that the worker, over the years, suffered knee problems "at regular intervals", that the worker had a medial meniscectomy in 1964, that he had an arthrogram in 1973, that he had his left knee cap removed in 1973 and that he had suffered a hematoma on his left knee in 1974.

The group sickness and accident representative of the accident employer indicated that she was aware of complaints of the worker concerning his knees and that he had injured his knees at work and had undergone surgery.

Former supervisors stated in interviews that they had general knowledge of the worker's problems with his knees. These additional statements were obtained long after the incident and plant closure.

The statement from a co-worker was taken in April 1985. According to the worker's testimony, this co-worker was the person who drove the hand-controlled lift truck carrying pallets when it struck the worker and caused the initial injury to his knees. This person is now retired and emphatically denied any knowledge of striking the worker with the lift truck. He denied being involved in the original accident and further denied any knowledge of a knee disability suffered by the injured worker. This person further stated he was only aware of the injured worker's knee problems a few years ago when the injured worker spoke to him at a local ski club.

The injured worker testified that, as a supervisor who had worked with the Industrial Accident Prevention Association, he was aware of WCB procedures for the filing of accident claims. He was a forthright witness who impressed the Panel as an individual who refused to let his disability interfere with his rigorous life style. However, the Panel has concluded that, in view of the long period of time involved since the original incident or incidents, the absence of confirming records, the conflicting statements from fellow workers concerning the initial accident, and the ongoing rigorous life style of the worker, there is not sufficient evidence to establish that the worker injured either his left or right knee by accident arising out of and in the course of his employment with the employer. The Panel concludes that it is more likely than not that there is no causal relationship.

DECISION:

The appeal is denied. The worker is denied entitlement to benefits for injuries suffered to his left and right knee in the 1960's.

DATED at Toronto this 21st day of April, 1986.

SIGNED: I. Strachan, D. Jago, S. Fox.

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Workers' Compensation Appeals Tribunal

DECISION NO. 140

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: B. Cook

Member: D. Mason



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 140

THE APPEAL PROCEDURE:

The worker appeals the decision of the Workers' Compensation Board Appeals Adjudicator M. Prpic, dated March 25, 1985, which denied entitlement to benefits for lower back disability subsequent to November 24, 1969.

The appeal was heard on March 21, 1986, in Timmins, by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, D. Mason, a member of the Tribunal representative of employers, and B. Cook, a member of the Tribunal representative of workers.

The worker attended and was represented by G. Renaud, solicitor. The accident employer was represented by R. Ahuja, an Occupational Health and Safety Engineer with the employer company. P. Auron assisted the Panel in the role of Tribunal Counsel.

The Panel read and considered the relevant forms, memoranda and reports from the Workers' Compensation Board file which were gathered together in the Case Description materials and were marked Exhibit #1. The Panel also considered the transcript of the Appeals Adjudicator Hearing, marked Exhibit #2, and an accident report for the November 14, 1969, accident, marked Exhibit #3.

The worker gave evidence under oath in oral testimony and was questioned by the worker and employers representatives, Tribunal counsel, Renaud, Ahuja, Auron, and members of the Panel. Submissions were made by both worker representatives Renaud and Ahuja.

THE ISSUE AND HOW IT ARISES:

The worker injured his back on November 14, 1969, while working for the accident employer, a mining company. It would appear from the employer's report of accident that the incident was reported on approximately November 18, 1969. In the intervening period between the accident and the reporting the worker missed one shift. The accident report indicates that the worker stepped out of the motor cab and while doing so his foot slipped causing him to fall against the side of the motor. The worker was diagnosed as having sustained soreness to his right side and back. On November 19, 1969, X-rays were taken of the worker's right side and back, on referral from the worker's family doctor, Dr. H. The X-ray reports stated:

"Examination of the right ribs is negative for fracture.
Examination of the lumbar spine shows a congenital spondylolysis of the lamina of the fifth lumbar vertebra, with about 12 mm anterior displacement of the fifth lumbar vertebra in relation to the first sacral segment.

There is no reference of recent fracture. Summary, negative right ribs. Congenital spondylolysis, with spondylolisthesis at the L5-S1 level."

The worker was judged fit to return to work by his family doctor as of November 24, 1969. On November 24, 1969, the worker terminated his employment with the accident employer because, according to the worker, he believed he could obtain a better paying job with another mine and to secure his new employment he could not be employed with another company when the offer of employment was made.

The worker continued to work as a miner for a variety of different mining companies until April, 1982, when he was forced to stop work on account of back problems. There is no doubt that at the present time the worker is seriously disabled as a result of his back problems and has been suffering from a disabling back condition for several years. There is also no doubt that the current diagnosis of the worker's back problem is spondylolisthesis of L5 with approximately 1 cm of forward displacement of L5 upon S1.

The issue before this Panel is whether the worker's present back disability is related to his November 14, 1969, accident.

There is some evidence in the Case Description Materials and in the transcript of the Appeals Adjudicator hearing which suggest that the back disability in 1969 was not congenital. This proposition was suggested by the worker's representative although not forcefully. What was urged upon the Panel much more strongly was the theory that the worker may have been suffering from a pre-existing condition which was asymptomatic until the accident of November 14, 1969, but then came to life, as it were, as a result of a serious accident. In this regard, it is to be noted that the worker's testimony before the Appeals Adjudicator and before this Panel was to the effect that he actually fell from a ladder anywhere from six or eight feet to sixteen feet above ground striking the rock wall and when he landed, he injured his side and back on the motor cab. This is obviously a substantially different version of events than was reported on November 18, 1969. It was further submitted that there was ongoing continuity of complaint and medical treatment after 1969. The combination of a serious blow to the back and continuity of complaint, it was submitted, established the fact that the accident made the pre-existing conditions symptomatic and from November 14, 1969, to the present the worker continued to experience ever increasing back problems, whereas before November, 1969, the worker experienced no back problems. From this, the Panel was invited to conclude that the worker's relatively minor pre-existing condition became symptomatic as a result of a serious accident on November 14, 1969, which led to ongoing back problems of an ever increasing nature, culminating in the worker's inability to work after April, 1982. The Panel agrees with the worker's representative that if continuity of complaint and a relatively serious incident were established, entitlement would flow.

The employer's representative submitted that the accident on November 14, 1969, was minor, and there were a number of years during which the worker was able to continue at his regular, heavy mining employment. Moreover, there was no continuity of complaint or seeking of medical attention. The Panel agreed that if the incident were minor and there was no continuity of complaint or medical attention, the worker would have failed to establish a relationship between his current back disability and the November 1969, accident.

The very narrow issues then, before this Panel, are the existence of a pre-existing condition, the degree of severity of the November, 1969, accident, and continuity of complaint and medical attention after 1969.

THE PANEL'S REASONING:

The Accident:

The original accident report indicates that the worker slipped and hurt his right side and back on the motor cab. His evidence before the Appeals Adjudicator was to the effect that he fell off a ladder and hit his right side and back on the motor. At the Appeals Adjudicator hearing his recollection was that he fell 12 to 15 feet. In his testimony to this Panel he indicated that he fell from a height of more than six feet and probably between 8 and 12 feet. This Panel is of the opinion that where a worker describes two very different versions of how an accident occurred and the latter version offers the worker a more favourable chance of gaining entitlement than the former, there is an onus on the worker to provide a rational and cogent reason to explain the reason for the different histories. At the Appeals Adjudicator hearing, the worker told the Adjudicator that he had failed to describe the more serious incident in the accident report of November 18, 1969, because "I was afraid maybe that, I don't know, I'd lose my job or something. I don't know. I am not too sure exactly what I said there."

At the hearing before this Panel, the worker was asked why, if he had been afraid of losing his job, he reported any accident at all, and if he did report, why did he mention his back? The worker replied that it wasn't because of fear of losing his job that he failed to report the incident as it occurred. He just didn't think it was important to describe what actually occurred. He indicated that he was fully aware of the company policy of prompt and full reporting of accidents. However, in this case, he felt that it was not important to describe the accident as accurately as he can now recall.

This Panel does not feel that the worker's explanation adequately explains the different versions of the accident. If the worker was afraid of losing his job, it is surprising to find any mention of a back injury in the accident report. On the other hand, the worker, under oath, has denied to this Panel that he was afraid of losing his job. His alternative explanation is that he did not think it was important to describe the accident accurately. He readily admitted being part of a training program with the accident employer in which prompt and accurate reporting of accidents was emphasized.

In the absence of a rational explanation as to the reason for a different version of events now put forward by the worker, this Panel is driven to conclude that the description in the employee's accident report is most probably the way the incident occurred.

Moreover, the condition of the worker's back after the accident would lend support to our conclusion that the accident did not constitute a serious blow to the worker's back. He was considered fit to return to work by his family doctor within ten days of the accident. The worker's own testimony before this Tribunal was to the effect that most of his problems immediately following the accident were in the area of his right side. He experienced a tingling sensation in his back after the accident but he felt that most of his problems were with his right side.

We find as a fact that the worker suffered a minor injury to his back as a result of losing his footing on November 14, 1969, and falling against a motor cab. We conclude that the minor injury to the worker's back would not, in and of itself, create the back condition subsequently diagnosed by X-rays taken on November 19, 1969. At most, the accident may have aggravated a pre-existing condition. Moreover, the absence of a serious trauma makes it necessary for the worker to clearly establish continuity of complaint and medical attention after the accident.

Continuity of Complaint:

Following the November 14, 1969, accident, the worker remained off work until the end of 1969 and then commenced employment with Kamiskotia Mines at the beginning of 1970. He worked at Kamiskotia for approximately two years and then transferred to Langmuir Mine, where he worked until 1978. After he stopped working at Langmuir he took a year off because of back problems and because there was a shortage of available work. He returned to the accident employer for about a year in 1979 and 1980. Then he worked for Pamour Mines until April, 1982, when he was laid off because the mine closed down. He did not return to work or look for work after that time on account of his back problems.

The worker changed family doctors on several occasions and as a result, the medical records would appear to be incomplete. A report from a WCB Claims Investigator makes reference to some of the older records which are in the possession of the worker's current family doctor. The records indicate an absence of specific medical notation with respect to back problems between the X-ray taken on November 14, 1969, and an X-ray taken on May 23, 1974. It is the worker's testimony that this latter X-ray was taken at the worker's request when he transferred family doctors in order to obtain a second opinion about his back problem. The 1974 X-ray confirms spondylolysis and low grade spondylolisthesis at the L5-S1 level.

The investigator's report further makes reference to a medical entry for a low back condition on December 30, 1975. The entry indicates that the worker was given anti-inflammatory pills and there was mention of six days. Other references to low back pain are found on January 15, 1976, and October 13, 1977. There are four references in 1976 to medical attention for a flu-like illness. It was the worker's evidence that on a number of occasions he was given a return to work slip by his family doctor in which the diagnosis was flu whereas, in fact, he had gone to the doctor because of his back problem. The worker told the Panel that this was done so that his employer would not find out that he had a back problem.

The worker further told the Tribunal that while working at Kamiskotia Mines, there were several occasions in which he went to his family doctor because of his back problem and he continued to have his back examined while employed at Langmuir Mines because it was bothering him.

This Panel concludes that the evidence contained in the Case Description Materials establishes ongoing back problems after 1975 and to the present. We do not, however, feel that the worker has met the onus of establishing continuity of complaint between 1969 and 1975. We reach this conclusion for the following reasons.

Although the worker indicated that he saw his family doctor on several occasions while working at Kamiskotia and in the early years of his employment with Langmuir Mines, there is no corroborating medical evidence to indicate that X-rays were taken, or that medication or other treatment was prescribed for the worker's back condition. Indeed, the worker testified that while employed at Langmuir, he was able to perform relatively heavy duties as a miner and did not miss any work between 1970 and 1972 on account of his back problem. He testified he did not tell any of his co-workers about his back problem because he was afraid of losing his job and as a result, the worker is unable to put forward any corroborating evidence from co-workers.

During his early years of working at Langmuir Mines, the worker changed family doctors and it is this latter family doctor who allegedly cooperated with the worker in providing him with return to work slips diagnosing treatment for the flu when the actual reason for visiting the doctor was his back problems.

If it were necessary to make a finding with respect to the "flu" reports, this Panel would have difficulty accepting the worker's description of the arrangement. The investigator's notes describe four occurrences in 1976 in which the worker was off due to a flu-like illness and during which the doctor who was treating him at the time had suspicions that there was something else bothering the worker which was not disclosed to the doctor. In his testimony before the Appeals Tribunal the worker was unable to describe the arrangement to our satisfaction. At one point the worker indicated that it was the doctor's idea to give him the flu reports. On other occasions, the worker indicated that the worker requested the flu reports and that the doctor went along with it. The investigator's notes would seem to indicate that the doctor was not aware of the arrangement.

In any event, even without making a finding with respect to the "flu" reports, we are of the view that the worker has failed to establish that there was continuity of complaint or medical treatment between 1969 and 1975. There is no corroborating medical evidence. There is no indication of treatment. Indeed, the worker was able to perform his normal job functions from 1969 at least until the early years of his employment at Langmuir without advising anyone of the problem.

In the absence of being able to establish a major incident on November 14, 1969, or continuity of complaint between 1969 and 1975, this Panel concludes that the worker's present disabling back condition is caused by a pre-existing condition which cannot be related to his November 14, 1969, accident.

THE DECISION:

The appeal is denied.

DATED at Toronto, this 4th day of April, 1986.

SIGNED: J. Thomas, D. Mason, B. Cook

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Workers' Compensation Appeals Tribunal

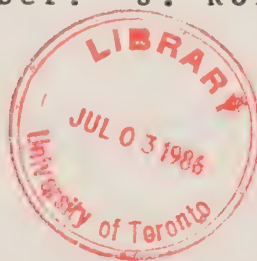
DECISION NO. 144

Tribunal d'appel des accidents du travail

Panel Chairman: I.J. Strachan

Member: R. Higson

Member: J. Ronson



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 144

THE APPEAL PROCEDURE:

This is an appeal from the decision of F.H. Kaliciak, Compensation Board Appeals Adjudicator, dated August 23, 1984.

The appeal was heard on March 24, 1986, by a panel of the Appeals Tribunal consisting of I.J. Strachan, Panel Chairman, R. Higson, a member of the Tribunal representative of workers, and J. Ronson, a member of the Tribunal representative of employers (the "Panel").

The worker appeared and was represented by Vicki Doidge of Community Legal Assistance in St. Catharines. Although the employer did not participate in the hearing, Gordon Andrew attended as an observer. The Panel was assisted by P. Auron, a member of the Tribunal Counsel Office.

The Panel heard and considered testimony under oath by the worker. The Panel also read the relevant forms, memoranda, reports, statements and medical reports extracted from the WCB file and collected in the Case Description materials together with the descriptive summaries. The Case Description, as approved by the worker's representative, was marked as Exhibit "1" at the hearing.

The Panel also had the benefit of certain additional materials including a vocational rehabilitation action memo from the WCB (Exhibit "2"), a series of decisions of umpires under the Unemployment Insurance Act (Exhibit "3") and a job response confirmation letter from Electronic Service Centre (Exhibit "4").

THE ISSUE AND HOW IT ARISES:

The worker's claim is for full compensation benefits, rather than the temporary partial payments of 50% granted to him, for the period January 31 to April 18, 1983.

The worker suffered a disability on June 7, 1981, when he was struck from behind by a roll of paper weighing approximately 600 pounds. He suffered contusions to his right leg, right patella and left patella. The injury was subsequently diagnosed as chondromalacia which is a softening of cartilage. According to the January 7, 1983, report of Dr. Jean M. Aubin, an orthopaedic surgeon, the injury is not improving and the worker now experiences aching in both legs and at times there is a numb type of pain from the mid-thigh to below the knee.

During the time period under appeal, the worker had determined that he could no longer perform manual labour tasks and had decided it was necessary for him to obtain retraining. He registered in the St. Catharines Business College for an eleven month term commencing January 28, 1983. The acceptance of his registration is dated December 9, 1982.

On January 4, 1983, J. Beatty of the WCB spoke to the worker who advised that he had enrolled at the St. Catharines Business School because he was laid off permanently as a result of an accident and required retraining. According to the WCB memorandum from J. Beatty:

"He needs money, I advised we would pay him up to date and explained Section 41 benefits."

On January 6, 1983, Evelyn Penner of the St. Catherines WCB Claims Office wrote to advise the Board:

"He (the worker) states he spoke with the Claims Adjudicator a few days ago regarding rehabilitation assistance. He stated he was told we would pay for his schooling."

On January 12, 1983, J. Beatty made the following response:

"Employee has been advised incorrectly. He is obviously fit to return to full time studies, therefore, benefits will cease January 28, 1983, inclusive. We will advise in writing."

On January 13, 1983, a letter was forwarded to the worker apologizing for misinforming him as to the possibility of further payment. On January 31, the compensation benefits were reduced to temporary partial 50%. The worker appealed the reduction.

On March 4, 1983, WCB forwarded a letter confirming that the worker would receive 50% of his compensation earnings for the period commencing January 31, 1983. The worker then resigned from his business course on March 4, 1983, citing "personal and financial problems". According to the worker, he continued his attempts to find full-time employment and subsequently accepted a position with Maple Leaf Village on April 19, 1983.

On April 15, 1983, a WCB rehabilitation counsellor telephoned the worker to advise that his status had changed; however the worker advised that he was starting work with Maple Leaf Village April 19, 1983. This job involved contacting various employers regarding discount packages for Maple Leaf Village and, according to the worker's testimony, involved a considerable amount of driving and walking. The worker claimed excess stress due to walking and driving and laid off work April 28, 1983.

THE PANEL'S REASONING:

There is no dispute that the worker suffered a compensable injury arising out of the accident of June 7, 1981. There is also no question that the worker received temporary partial (50%) benefits for the period January 31 to April 18, 1983. This latter period can be sub-divided into two sub-periods: (a) the period January 31 to March 4, 1983, ('Period A') during which he was enrolled in the business course and (b) the period March 5 to April 18 ('Period B') when he was not enrolled in the course prior to commencing work with Maple Leaf Village.

Section 41(1)(b) of the Workers' Compensation Act (as amended 1982, Chapter 61, Section 2) provides:

41(1) Where temporary partial disability results from the injury, the compensation shall be, ...

(b) Where the worker does not return to work, a weekly payment in the same amount as would be payable if he were temporarily totally disabled, unless he,

(i) fails to co-operate in or is not available for a medical or vocational rehabilitation program which would, in the Board's opinion aid in getting him back to work and in lessening or removing any handicap resulting from his injuries, or

(ii) fails to accept or is not available for employment which is available and which in the opinion of the Board is suitable for his capabilities.

In the case before the Tribunal, the Board had indicated that rehabilitation services for the period in question were not available to the worker. At lines 12 to 16 inclusive of Exhibit "2" the Board representative notes

"Further I explained that due to Claims decision, worker not eligible to receive V.R.D. services, particularly his request for V.R.D. sponsorship in formal retraining."

In addition WCB Memo #39 provides:

"Worker should not be entitled to retraining, as worker only has minimal findings..."

Accordingly it is the finding of the Tribunal that, since the worker was not eligible for a vocational rehabilitation program, he cannot be disqualified from benefits under sub-paragraph (i) of S.41(1)(b) for failing to co-operate with respect to such a program.

It follows that if the worker is to be disqualified from receiving temporary total benefits, he must be disqualified under sub-paragraph (ii) of S.41(1)(b) insofar as he "fails to accept or is not available for employment which is available...".

There is no evidence that the worker failed to accept employment which was available during either ?????????? Period B. If he is to be disqualified, it must be on the basis that he was not available for employment which was available for the periods in question.

With respect to Period A (i.e. the time during which he was enrolled in the business course), the worker testified that he attended the business college from 8:00 a.m. to 3:30 p.m. Monday through Thursday. He further testified that after school and on his free days, he attended at Canada Manpower and made attempts to find employment by visiting various establishments. The Tribunal had written

evidence of his attempts to obtain employment with General Motors, Port Weller Dry Docks (A Division of Upper Lakes Shipping Ltd.) and Electronic Service Centre. These attempts were made in February, 1983 when the worker was enrolled at the business college. The worker testified that he had made additional attempts at finding employment but had not kept a written record because he was not aware he would be required to do so. He testified that he had attended at certain furniture stores and stereo shops in an attempt to find a sales position and would have left his business course if he had found employment.

The worker indicated that, when he was advised of the contents of the WCB letter of March 4, 1983 (i.e. that 50% benefits were confirmed), he left the business college course because he could not afford to remain in the course without further assistance from WCB.

The worker testified that from March 4 until April 18, ("Period B") he conducted job searches at various places including the Electronic Service Centre once again, a gas bar, a health club and Canada Manpower. He estimated that he had made between 15 and 20 attempts to find employment during this period. He obtained employment with Maple Leaf Village on April 18, 1983.

It is the finding of the Tribunal that the worker made reasonable efforts to find employment during Period B when he was not enrolled in the business course. The worker's availability for work is a question of fact and in reaching a conclusion, the Tribunal has examined a number of factors including the worker's intentions, the number and frequency of employment attempts, and the types of positions available to the worker given his condition.

What then is the effect of his enrollment in the business course during Period A? In reviewing the wording of Section 41(1)(b)(ii), enrollment in a business course for four days per week may create an initial impression that the worker is not available for work. However, this impression or presumption is a rebuttable presumption. The matter of availability is a question of fact dependent upon the circumstances. The rebuttable presumption may be rebutted if the worker is prepared to leave his course of instruction the moment he secures full-time employment and makes reasonable efforts to find employment. In those circumstances the claimant is "available for employment". The Act does not provide that a claimant automatically ceases to be eligible for benefits in the event he enrolls in a course.

An active job search is the best evidence of availability for employment and it is the finding of the Tribunal that the worker, during Period A, made reasonable efforts to locate employment as evidenced not only by his testimony but also by the written confirmation from the prospective employers. This evidence is sufficient to rebut the initial impression that the worker was not available for employment during Period A. Enrollment in the course is not, of itself, sufficient to disqualify the worker from receiving full benefits and in the case before the Tribunal, the worker has rebutted any adverse presumption that may have arisen from such enrollment.

Accordingly, the Tribunal concludes that the worker was available for employment during both Period A and Period B.

DECISION:

The appeal is allowed. The worker is entitled to full compensation for his temporary partial disability for the period January 31 to April 18, 1983.

DATED at Toronto this 18th day of April, 1986.

SIGNED: I.J. Strachan, R. Higson, J. Ronson.

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Workers' Compensation Appeals Tribunal

DECISION NO. 146

Tribunal d'appel des accidents du travail

Panel Chairman: N. Catton

Member: B. Cook

Member: D. Mason



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

May 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 146

THE APPEAL PROCEDURE

This is an appeal by the worker from a decision of the Workers' Compensation Board Appeals Adjudicator, F.H. Kaliciak, dated August 27, 1985.

The appeal was heard on March 24, 1986, by a Panel of the Appeals Tribunal consisting of N. Catton, Panel Chairman, B. Cook, a member of the Tribunal representative of workers, and D. Mason, a member of the Tribunal representatives of employers.

The worker appeared and was not represented. The employer was given notice of the hearing but elected not to attend. V. Mark was present from the Tribunal's Counsel Office. The Panel read the Case Description recital of facts prepared by Tribunal's counsel and agreed to by the worker. The Panel also read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials.

The worker and Ms. Mark made submissions to the Panel during the hearing.

THE ISSUE AND HOW IT ARISES

The issue before the Panel is whether the worker should be granted a full commutation of his pension in order to purchase a home and cover the costs of moving his family.

Mr. Kaliciak, the Appeals Adjudicator, concluded that the worker's request for commutation did not meet the criteria of the Vocational Rehabilitation Division and that from a rehabilitation perspective it would be best not to commute the worker's pension.

The worker receives this pension as a result of an injury which occurred on November 29, 1979, to his left hand. The permanent disability was rated by the WCB at 25%. At the time of the hearing the commuted value, as calculated by the WCB was \$52,511.34.

The worker attempted to return to work with the accident employer in April, 1980, but was unable to cope. Since that time the worker has, in the Panel's view, been very diligent in searching for suitable employment. When he has found such employment he has continued to look for better employment so as to improve his financial and vocational position.

For most of the time since the accident the worker has resided in Smith Falls, Ontario. He has demonstrated a willingness to locate elsewhere if such relocation would help him to find better employment and has commuted to Ottawa (involving some 100 miles of travel daily) to perform low paying jobs or to attend work assessment programs sponsored by the Workers' Compensation Board. He has also requested, on a number of occasions, that his pension be commuted. These requests have been denied

by the WCB with the exception of a partial commutation in the amount of \$12,382 which was granted in December, 1984, to allow the worker to liquidate a debt which he had incurred so as to purchase a car.

In March, 1986, the worker secured employment in northern Ontario with a large mining company. There is a shortage of rental accommodations in his new location.

THE PANEL'S REASONING

A significant factor in our decision was the obvious motivation of the worker in this case. He has persisted in his rehabilitation activities since his physical recovery. We were impressed by his continuing determination to provide for his family and improve their standard of living.

The worker requested a commutation to provide for a home for his family. He now has secured employment with a large corporation at a significantly increased rate of pay. To encourage long-term employment the corporation has offered a \$25,000 second mortgage forgivable after eleven years of employment. In order to provide a home and take advantage of the financial incentive the worker requires a down payment.

The Panel is satisfied that the decrease of the worker's monthly pension which would flow from the granting of the partial commutation to provide for the down payment would not significantly decrease the worker's monthly income. The Panel is also satisfied that the costs associated with home ownership, including the mortgage, would be equivalent to the rental cost. The Panel, therefore, is of the view that the worker's financial situation will not be adversely affected by a partial commutation and the financial incentive offered by the corporation may well work to the worker's long term financial benefit.

In addition to the financial implications, the Panel also considered the Board's policy and general purposes of commutations. As detailed in Tribunal Decision No. 16, commutations should be granted bearing in mind the long term best interest of the worker and as a rehabilitative measure. In our view the worker has been vocationally rehabilitated. He is now a permanent employee earning wages equivalent to his pre-accident wages. The question arises whether or not the worker is in need of further rehabilitation. In the Board's statement introducing its vocational rehabilitation manuals it notes that rehabilitation cannot be complete without both vocational and social rehabilitation. In the Panel's view the purchase of his home would serve an important rehabilitative function.

Prior to the injury the worker had a home. Following the injury, because of financial setbacks, he was required to sell that home. The granting of the commutation in this case may well be seen to be rehabilitative.

Finally, the Panel notes that the Board's own policy on rehabilitation suggests that a commutation can be granted for the purchase of a home when a change of employment requires relocation and rental accommodation is not considered suitable. (Vocational Rehabilitation Document 04-01-03). The worker has moved to a small mining community in northern Ontario. There have been recent expansions of the mining industry and there is a shortage of homes in the community for the additional staff. For this reason the employer has become involved in facilitating

the development of new housing. There is not a sufficient amount of rental housing. Thus, in this case, the granting of the commutation would simply be in keeping with the Board's own policies.

The Panel would also like to note that much of the information produced by the worker at the hearing of this appeal, which provided the basis of its decision, was not available to the Appeals Adjudicator.

In reaching its decision the Panel has decided not to commute the worker's total pension. A partial commutation will provide the worker with the funds necessary to provide a home for his family. With an adequate down payment the worker should realistically meet his monthly obligations. For the purpose identified by the worker there is no need to disturb the entire pension.

DECISION

The appeal is allowed.

- 1) The worker is granted a partial commutation of \$10,000.00 to be applied to a down payment of a house.
- 2) When considering this case the Panel also reviewed the Board's Vocational Rehabilitation Policies. According to Document 05-02-03, in the Vocation Rehabilitation Division Policy Manual, the Board has the authority to grant the worker funds to assist with relocation expenses. The worker has not applied for such a grant. The WCB is directed to decide whether such a grant should be given to this worker.
- 3) If the Board determines that a grant should not be paid in this case the partial commutation should be increased by a maximum of \$5,000.00 to provide the worker with sufficient funds to move his family and belongings to their new home, and other relocation expenses.

If a problem arises in the administration of this decision, either the Board or the worker are invited to request additional direction from the Panel.

DATED at Toronto this 23rd day of May, 1986.

SIGNED: N. Catton, B. Cook, D. Mason.

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Workers' Compensation Appeals Tribunal

DECISION NO. 150

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: S. Fox

Member: D. Jago

LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKER'S COMPENSATION APPEALS TRIBUNAL

DECISION NO. 150

THE APPEAL PROCEDURE:

The worker appeals the March 28, 1985, decision of the Worker's Compensation Board's Appeals Adjudicator W. Ireland which denied the worker's claim for entitlement to compensation benefits for a broken left ankle arising out of a parking lot incident on June 6, 1984.

The appeal was heard on March 25, 1986, by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, S. Fox, a member of the Tribunal representative of workers and D. Jago, a member of the Tribunal representative of employers.

The worker appeared and was represented by L. Ladd, from the U.A.W. The employer, an automotive manufacturing company was represented by G. Howes, a Compensation Adjuster from the employer company. The Tribunal was assisted by R. Nairn, in the role of Tribunal counsel.

The Panel read and considered the relevant forms, memoranda, and reports extracted from the WCB file and contained in the Case Description. The Panel also considered the transcript of the hearing before the Appeals Adjudicator.

The worker, Mr. Ladd and Mr. Howes gave oral testimony under oath and were examined by Tribunal Counsel and by members of the Panel. Submissions were made by Mr. Ladd, Mr. Howes, and Mr. Nairn.

THE ISSUE AND HOW IT ARISES:

The worker broke his left ankle while alighting from a pick-up truck in a parking lot owned and maintained by his employer. The accident occurred at approximately 5 p.m. on June 6, 1984, as the worker was arriving for his evening shift. He was a passenger in a truck operated by a co-worker. He testified that he got out of the vehicle by placing his left foot on the ground and turning his body as he moved his right foot out of the vehicle. Upon reaching the standing position just after moving his right foot out of the vehicle he fell over and immediately experienced pain in his left ankle. He was unable to say whether there was an obstruction or object in the parking lot which would have caused him to fall. The relatively awkward motion of getting out of the vehicle was a result of a tunnel vision problem experienced by the worker which restricts the worker's peripheral vision.

The Appeals Adjudicator concluded that the employer had done nothing to cause the accident and the worker was carrying out a personal act of descending from the vehicle at the time of the employment. Accordingly, the Appeals Adjudicator concluded that the accident did not arise out of or in the course of the worker's employment. That is the issue before this Panel.

THE PANEL'S REASONING:

Most of the facts in this appeal are not in dispute. It is agreed that the parking lot was owned and maintained by the employer when the accident occurred. The lot was intended for the use of hourly paid employees, although members of the public were not prohibited from using the lot, and, indeed, around the time of the worker's accident many contractors parked their vehicles in the lot.

The parking lot was made of asphalt. The company says it was swept regularly and was in good condition. The worker's representative stated that the lot was in a deteriorated condition and that it was quite possible that the worker had twisted his ankle on a stone or some other object. In any event, Mr. Ladd asked this Panel to find that in the absence of conclusive evidence as to whether the worker tripped on an object in the parking lot, the Tribunal should apply the benefit of doubt in favour of the worker and so conclude.

On this preliminary point, we do not concur with Mr. Ladd. There was evidence from the employer that the lot is swept on a weekly basis. There was evidence from Mr. Ladd that the lot is cleaned irregularly. The worker does not know whether he tripped on something. Nor did the only witness, Mr. Ward, who testified before the Appeals Adjudicator. There is uncontradicted evidence that the worker suffered from vision problems which caused him to alight from the vehicle in an awkward way.

The benefit of doubt principle cannot be used to create something out of nothing. It can only be applied where the evidence for and against a particular finding is approximately equal. Here, there is uncontradicted evidence of an awkward movement and vision problems as possible causes of the injury. The only evidence to support the theory that an object on the ground may have caused the injury is highly speculative and is not supported by testimony from the worker or the only witness to the accident. We are satisfied that the accident more probably resulted from the awkward manner in which the worker got out of the truck - a motion which may well have been caused by the worker's vision problems. It has not been established on the evidence before us that the employer's maintenance of the lot contributed to the injury.

To conclude that the employer was not responsible for the accident does not dispose of the matter. For the worker to establish entitlement to benefits, the worker must establish that the accident arose out of and in the course of employment and was not attributable to the worker's serious and wilful misconduct. Even if caused by the worker's serious and wilful misconduct, an accident is covered by the Act if the injury results in death or serious disablement. These requirements are contained in s.3(1) of the pre-April, 1985, version of the Worker's Compensation Act.

In this case, there is no suggestion that the worker's conduct amounted to serious and wilful misconduct. The sole issue is whether the accident arose out of and in the course of employment.

For an accident to arise out of the employment requires something about the employment which can be said to have caused the accident. To arise in the course of employment requires the worker to be, in some way, in the performance of his/her duties or engaged in doing something incidental thereto when the accident occurred.

Once it has been established that an accident either arose out of or arose in the course of employment, there is a rebuttable presumption that the other condition has been satisfied:

"Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment and, where the accident occurred in the course of the employment, unless the contrary is shown, it shall be presumed that it arose out of the employment."

s.3(2) of the old Act

The case law on parking lot injuries has consistently concluded that a company owned parking lot is part of the employer's premises. For example, in his text "Workman's Compensation Law", Arthur Larson states at page 4-87:

"As to parking lots owned by the employer, or maintained by the employer for his employees, the great majority of jurisdictions consider them part of the "premises", whether within the main company premises or separated from it."

This concept has been adopted by the Board in the Board's Directive 21 under s.3(1) in the Claims Services Division Manual, part of which reads:

"The employer's premises are defined as the building, plant or location in which the worker is entitled to be, including entrances, exits, stairs, elevators, lobbies, parking lots, passageways and roads controlled by the employer for the use of the workers as access to and egress from the work site."

Having defined the employer premises to include employer owned parking lots, one might well assume that once a worker has reached a company-owned lot, the worker's entitlement to compensation would be no different whether the accident occurred inside the plant or on the lot.

However, in the above mentioned Directive, the Board has adopted a specific set of guidelines to be considered in parking lot cases, as distinct from accidents which occur in the plant. The relevant provisions of that Directive are as follows:

"2. Accidents Occuring On Employer Parking Lots Including Plazas and Malls

a) In the Course of Employment

A worker who has a right to be on an employer owned parking lot at the time of the accident and who is injured while walking is considered to be in the course of employment. However, a worker is not considered to be in the course of employment in parking areas associated with industrial and shopping plazas and malls where the parking areas are not under the control of the individual employer.

If the parking space for the worker is regulated and allocated by the employer, the protection of the Act exists while the worker remains in the allocated area.

The worker is considered as a member of the general public from the time the worker leaves the allocated parking area until the employer's premises are reached. A worker using an indoor street or walkway to reach his place of employment is not covered by the Act until he arrives at the employer's premises. The rationale is that indoor streets and walkways are open to the general public and are not under the control of the individual employer who leases the premises from the owner of the plaza or mall. The worker is "in the course of employment" as soon as he reaches the employer's premises.

b) Arising Out Of Employment

The policy statements concerning "arising out of employment" under the heading Accidents Occurring on Employer and/or Private Roads, also apply to Accidents Occurring on Employer Owned Parking Lots Including Plazas and Malls. No entitlement is granted for an accident in the allocated parking area while driving a vehicle for personal reasons unless the accident is caused by the condition of the parking lot or happening under the control of the employer."

The following portion of the above-mentioned Directive describes the matters to be considered in deciding whether an accident occurring on employer owned and/or private roads arises out of employment:

"1. Accidents Occurring On Employer Owned and/or Private Roads

b) Arising Out Of Employment

An accident shall be considered to arise out of the employment when it happens on the employer's premises as defined, unless at the time of the happening of the accident:

--the accident is occasioned by the injured worker using for personal reasons, any instrument of added peril such as automobile, motorcycle or bicycle, except when the accident was caused by the condition of the road or happening under the control of the employer, or

--the worker is performing an act not incidental to his work or employment obligations."

According to the Board's Directive, a worker who has a right to be on a parking lot is in the course of his employment. Applying the s.3(2) presumption, an accident is deemed to arise out of the employment unless the contrary is shown. Where a worker brings onto a parking lot an "instrument of added peril" as described by the Directive, the Board would appear to view this as the introduction of an unusual risk which becomes the cause of the accident and therefore rebuts the presumption.

In our view, the notion of an instrument of added peril requires that the peril be unusual or unforeseen. The use of motor vehicles in parking lots would seem to be more in the nature of a normal peril within the contemplation of the employer when considering the uses to be made of the parking lot. In this sense, the use of a motor vehicle in a parking lot would not constitute an unusual risk. Thus, we would not think that the normal use of a motor vehicle in a parking lot would rebut the presumption in s.3(2).

We are not saying there are no compelling reasons for the Board to have drawn a compensation line between walkers and riders. However, one undesirable consequence of making the distinction as the Board has done is the introduction of the concept of fault into a no-fault scheme. Under the Directive, if the worker is a rider, the employer's conduct must be examined to determine whether the accident arose out of the employer's misconduct and therefore arose out of the employment. Another consequence which this particular case highlights is the necessity of drawing a very fine line to separate walkers from riders. In our view it is much easier and less contentious to draw a distinct line, either at the entrance to the parking lot or at the entrance to the plant than it is to embark on a scrutiny of the movements of the worker and the employer in order to decide whether the injury is covered by the Act.

It is reasonable to conclude that a worker is "in the course of his/her employment" within the meaning of the Act, upon arrival at the employer's premises, including the company owned parking lot, for the purpose of reporting to work to carry out duties for the employer. This is certainly an activity incidental to the worker's employment. An accident would then be presumed to have arisen out of the employment. The presumption in s.3(2) could be rebutted by a finding that the worker's conduct was of a purely personal nature. Or, in some situations, compensation may be denied on the basis of the worker's serious and willful misconduct. However, the mere fact of driving a vehicle on the employer's parking lot does not necessarily change the character of a resulting accident.

There is nothing inherently purely personal about parking a car once a worker arrives at work. Such activity is no more or no less personal than the act of walking from the car to the employer's building. The conduct of the driver, like the conduct of the walker, might, in certain circumstances take the worker out of the employment relationship. In our view, the mere act of driving and parking a vehicle on a company parking lot does not.

In this case, the worker was not a walker. He was not a rider. He was standing when he fell. Presumably he was using what the Directive would consider to be "an instrument of added peril" in that it would appear that he had just left the car and probably had not shut the door when the accident occurred. Because he was standing, it can be argued that he was closer in conduct to a walker than a rider.

Without commenting further on some of the problems encountered in trying to fit the Board's policy to the Act, we are of the view that even applying the Board policy to the facts of this case results in a finding of entitlement. The worker arrived at the lot at the appropriate time and entered the lot the appropriate way. At the time of the accident, the worker could be construed as "using" the vehicle only in the most peripheral way. The vehicle was parked and hence ceased to be an "instrument of peril". The worker was no longer in the vehicle when he was injured. In our view he had crossed over the line between rider and walker and hence was in the course of his employment, about to embark towards his place of work on his employer's premises.

Although from the reasons we have given it was not necessary for the Panel to disregard the Board's Directive on parking lot cases, we would suggest that the Board give consideration to the problems which we have identified in attempting to use Directive 21.

THE DECISION:

The appeal is allowed. This Panel concludes that the worker's injury was caused by an accident which arose out of and in the course of his employment and thereby has established entitlement under s.3(1) of the Act. We leave to the Board the determination of the amount and extent of compensation to which the worker is entitled.

DATED at Toronto this 18th day of April, 1986.

SIGNED: J. Thomas, D. Jago, S. Fox

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Workers' Compensation Appeals Tribunal

DECISION NO. 152

Tribunal d'appel des accidents du travail

Panel Chairman: L. Bradbury

Member: F. Lankin

Member: D. Mason



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

June 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 152

THE APPEALS PROCEDURE

The worker appeals the decision of the Workers' Compensation Appeals Adjudicator, T.D. Allamby, dated March 15, 1985.

The appeal was heard on March 26, 1986, before a Panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, F. Lankin, a Tribunal member representative of workers, and D. Mason, a Tribunal member representative of employers.

The worker appeared and was represented by A. Asmus from the Community and Legal Aid Services Program. The employer received notice of the hearing but chose not to attend.

The Panel heard and considered oral evidence, given under oath by the worker. It also read the recital of facts contained in the Case Description Materials, prepared by the Tribunal's Counsel Office and marked as Exhibit #1 at the hearing. The worker's representative provided the Panel with written submissions which he referred to during the hearing.

THE ISSUE AND HOW IT ARISES

The issue before this Panel is whether the worker's onset of pain in his left shoulder in December, 1983, and his subsequent disability resulted from his work accident to his left shoulder on August 3, 1983.

The history of the claim is as follows:

On August 3, 1983, the worker, who was employed as a shipper/receiver, was unloading trucks. A box he was lifting onto a skid fell back on his left shoulder, causing him immediate pain.

Following a diagnosis of "strained left shoulder", the worker was off work from August 8, 1983, until October 3, 1983. He received temporary total disability compensation and health care benefits from the Workers' Compensation Board.

The worker returned to work on October 4, 1983, and performed his regular job, although his family doctor had recommended light work. The worker continued to have some discomfort in his left shoulder following his return to work. His family doctor, Dr. A.M. Lockhat, referred him to an orthopaedic specialist, Dr. H. Weinberg.

The worker continued working until November 25, 1983, when he was temporarily laid-off by the employer due to lack of work. The worker applied for and received unemployment insurance benefits.

On or about December 6, 1983, the worker was lying on his sofa at home. When he raised himself on his left arm to get up, he felt pain in his left shoulder.

The worker telephoned Dr. Lockhat the same day and was advised to take pain killers. Dr. Lockhat saw the worker on or about December 7, 1983, and diagnosed "capsulitis in the left shoulder".

The worker saw the specialist Dr. Weinberg again on February 1, 1984, on referral from Dr. Lockhat.

The worker returned to work on February 6, 1984, and has remained with the employer since that time.

The worker claimed compensation from the WCB on the basis that his left shoulder problem after December 6, 1983, resulted from his original compensable injury. The Board's Surgical Consultant was asked for an opinion.

As well, the Board contacted both Dr. Lockhat and Dr. Weinberg for their comments on the relationship between the original accident on August, 1983, and the problem in December, 1983.

The Appeals Adjudicator stated he was "satisfied that (the worker's) recurrence did not occur insidiously" but was caused when the worker tried to push himself up from the sofa. Therefore, the Adjudicator concluded that the incident in December, 1983, constituted a new, non-industrial accident and was not related to the worker's left shoulder disability suffered at work on August 3, 1983.

THE PANEL'S REASONING

In deciding whether the disability after December 6, 1983, resulted from the August, 1983, accident, the Panel considered the following:

1. The nature of the injury suffered on August 3, 1983:

The worker's evidence was that he was pulling a 20 kilo box from above shoulder level to place it on a skid. The strap holding the box broke, the box fell and struck the worker directly on the shoulder.

The injury was diagnosed as "strained left shoulder". The worker was off work until October 3, 1983.

2. Extent of recovery prior to December 6, 1983:

Although the worker returned to his regular work on October 4, 1983, his evidence was that he continued to have discomfort in his left shoulder.

A co-worker provided a statement to the WCB that the worker complained to him of pain in his left shoulder "on several occasions in October and November".

As well, the orthopaedic specialist, Dr. Weinberg, saw the worker on October 17, 1983, and reported "he still has some discomfort in the left shoulder" and that "he gets pain after working 4 or 5 hours". Dr. Weinberg concluded "there does not appear to be anything much wrong other than some residual sensitivity from a contusion. I reassured him that the discomfort would gradually resolve".

3. The nature of the incident on December 6, 1983:

The worker felt immediate pain in his left shoulder when he raised himself on the sofa. The worker indicated that the pain was similar to that he suffered at the time of his original accident on August 3, 1983. Dr. Lockhat diagnosed "capsulitis" in the left shoulder and noted there had been an original injury to that shoulder on August 3, 1983.

Although this incident did not occur at work, if it is established that the first accident was a significant cause of the second incident, the worker is entitled to compensation for the second incident as well.

4. The nature of the injury and disability after the December 6, 1983, incident:

There are a number of medical opinions with regard to the relationship between the first and second incidents.

(a) Dr. Teskey, a Surgical Consultant at the WCB gave his opinion on April 18, 1984, that:

"There are two histories regarding onset. If this was a contusion as Dr. Weinberg suggests then I would reject recurrence.

However, Forms 7 and 8 suggest a lifting strain and this could result in minor ongoing or recurrent complaints and on this basis I would accept".

With Dr. Teskey's concern in mind, the Panel closely questioned the worker about the specifics of the accident. The Panel is satisfied from the evidence that the accident occurred while the worker was pulling or lifting a box out of the truck and the box fell on his shoulder, causing the contusion. Therefore, it appears that the shoulder strain did result from a combination of a lifting incident and a contusion.

(b) Dr. Weinberg saw the worker on February 1, 1984. He reported "some crepitus" and that "the worker had some tenderness over the deltoid region". His conclusion was "he may have some residual sensitivity in the left shoulder following a contusion. ...he can carry on with activity as tolerated".

When asked for his opinion on the relationship between the two incidents, Dr. Weinberg stated on October 30, 1984, that:

"The main concern I suppose is whether the recurrence of pain and difficulty with the left shoulder was in any way related to the original accident. It is hard to say for sure whether there is or is not a causal relationship here. However, I do not see anything else that would account for the onset of pain and stiffness in the shoulder of an otherwise healthy young man".

(c) Dr. Lockhat, in a report dated February 25, 1985, stated:

"(The worker) besides incurring a contusion in August, 1983, has also developed some tendonitis of his left shoulder. This gradually improved but with aggravation of the tendon in and

around December, 1983, caused a recurrence of his symptoms. Therefore, I feel that (the worker's) disability is a result of the accident of August 3, 1983".

CONCLUSION

The Panel finds that the medical reports, combined with the account of the accident and the continuing discomfort between August and December, support a relationship between the original accident in August, 1983, and the disability after December, 1983. On the basis of the evidence before it, the Panel finds it is more probable than not that the worker's disability after December 6, 1983, would not have occurred but for the August, 1983, compensable injury. Although the incident on December 6, 1983, aggravated the worker's disability, the disability was still a direct result of the original compensable injury.

The only issue before this Panel is the question of causation. The Panel leaves to the WCB the determination of the level of benefits to which the worker is entitled.

DECISION

The appeal is allowed. The worker is entitled to compensation for his left shoulder disability for the period between December 6, 1983, and his return to work in February, 1984. The Board is to determine the level of benefits to which the worker is entitled.

DATED at Toronto this 11th day of June, 1986.

SIGNED: L. Bradbury, F. Lankin, D. Mason.

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Workers' Compensation Appeals Tribunal

DECISION NO. 154

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: S. Acheson

Member: D. Jago



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKER'S COMPENSATION APPEALS TRIBUNAL

DECISION NO. 154

THE ISSUE:

In this appeal, the issue is whether the individual who was injured in a motor vehicle accident was a "worker" within the meaning of the Worker's Compensation Act at the time of the accident, thereby being entitled to compensation for his injury.

In this decision, the use of the word "worker" refers to the individual who is seeking to establish the status of worker as defined by the Act. The word "employer" refers to the company for whom the worker was allegedly involved in an employment relationship at the time of the accident.

THE APPEALS PROCEDURE:

The worker appeals the August 9, 1985, decision of the Workers' Compensation Board Appeals Adjudicator M. Prpic which upheld a Claims Review Branch decision in which the worker was found not to be a worker within the meaning of the Act.

The appeal was heard on March 26, 1986, by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, S. Acheson, a member of the Tribunal representative of workers and D. Jago, a member of the Tribunal representative of employers.

The worker and the employer appeared without representation. J. Marshall assisted the Panel in the role of Tribunal counsel.

The Panel read the relevant forms, memoranda, and reports extracted from the WCB file and collected in the Case Description Materials which were marked as an exhibit. The Panel also considered seven pages of documents submitted by the worker at the hearing and marked as an exhibit with the consent of the employer.

The Panel heard evidence from the worker, the employer, and two witnesses called on behalf of the worker, given in oral testimony under oath.

Submissions were made by the worker and by Tribunal counsel.

HOW THE ISSUE ARISES:

The worker was injured in a motor vehicle accident in Barrie on August 7, 1984. The worker contends that at the time of the accident he was employed by the accident employer, a paving company, as a salesman pursuant to an oral agreement between the worker and the owner. According to the worker, this agreement was originally made in the Spring of 1984 before the paving season commenced and was confirmed in a discussion with the owner on August 2, 1984, at which time, according to the worker, the owner agreed to put him on the payroll.

The Appeals Adjudicator concluded that the worker was not a worker as defined by the Act because the employer's payroll records failed to confirm that the worker was on the payroll and there was no evidence to support the worker's testimony as to the August 2, 1984, meeting.

THE PANEL'S REASONING:

The Case Description Materials make reference to several issues in addition to the worker status question which should be addressed at the outset of this decision. As to whether the worker would have been in the course of his employment when the accident occurred, we find that on the uncontradicted evidence of the worker, he was on his way to the Barrie answering service to pick up sales leads when the accident occurred. The owner does not dispute that the worker was responsible for collecting leads from the Barrie answering service. The worker was travelling in a vehicle which was owned and maintained by the employer company. The worker's duties required him to travel as part of his job. We find, therefore that the worker was in the course of his employment when the accident occurred.

We also conclude that the worker did not disentitle himself to benefits because of his conduct. S.3(1)(b) of the Act disentitles a worker from benefits where the injury:

"is attributable solely to the serious and wilful misconduct of the worker unless the injury results in death or serious disablement."

The worker contests the police report description of the accident in which it is alleged that the worker failed to obey traffic signals. Even if this were proven, and the evidence is that the matter has not come before the courts, it would not, in our view constitute wilful misconduct. Wilfulness requires some degree of intent which we do not find in the act of disobeying a stop sign. It cannot be inferred from allegations contained in a police report of simply failing to obey traffic signals. We therefore find that the worker is not disentitled from benefits on account of s.3(1)(b).

The sole issue, then, is the employment status of the worker at the time of the accident.

The worker and the employer differed in their description of the meeting that took place in the Spring of 1984 and on August 2, 1984. However, it is not disputed that in 1984, the worker performed the following work on behalf of the employer. He followed up sales leads for paving contracts in the Barrie area, using his own sources as well as the employer's Barrie answering service for which the worker had the access code. He estimated jobs and prepared contracts for prospective customers of the employer to sign. He forwarded the contracts and deposits to the Head Office of the employer for approval. He supervised the jobs for which he obtained contracts.

That the worker obtained contracts during the 1984 paving season, up until the date of his accident is confirmed by the owner, by copies of contracts contained in the Case Description Materials, and by two co-workers who gave evidence.

The owner agreed that the worker's duties in 1984 were essentially the same as his duties in 1983. He was responsible for sales in the Barrie area. He had the same company car privileges as in 1983. He began obtaining contracts for the company in May or June of 1984 and continued to do so until his accident.

What was different in 1984 was the method of payment. In 1983, the worker was paid \$385 per week for twenty weeks and was on the company payroll. It turned out from the evidence given by the employer, that, although standard deductions were made, the weekly payments were not salary payments, but, in fact, were advances on commission sales. The worker was paid a commission of 10% on sales in 1983. The commission was paid out to the worker in the form of regular weekly amounts.

In 1984, the parties agreed that the worker was also to be paid on a commission basis. The difference between the method of payment in 1984 and 1983 was the fact that regular weekly payments had not been made by the time the accident occurred. However, the owner testified that he had offered the worker regular weekly payments in their Spring meeting and the worker had refused the offer. The owner further testified that if the worker had not been injured, he would have put him on the payroll and started the regular payments. The owner stated that he did, in fact pay the worker after the accident for the commissions earned before the accident.

The pre-April 1985 Act defines worker as follows:

"worker" includes a person who has entered into or is employed under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes a learner, a member of a municipal volunteer fire brigade, a member of a municipal volunteer ambulance brigade, an auxiliary member of a police force, a person deemed to be a worker under section 11, and a person who is summoned to assist in controlling and extinguishing a fire under the Forest Fires Prevention Act or who assists in any search and rescue operation at the request of and under the direction of the Ontario Provincial Police Force but, where used in Part 1, does not include an outworker or an executive officer of a corporation or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business."

The worker's employment was consistent with the purpose of the employer's business. Hence the worker is not specifically excluded under the casual worker exemption which requires that the work not only be of a casual nature but the worker be employed otherwise than for the purposes of the employer's trade or business.

The statutory definition of worker would appear to cast a wide net over a multitude of different employment relationships. The definition itself is not exhaustive because the definition specifically states that "'worker" includes ...". Moreover, the worker - employer relationship need not be set down in writing and the statutory definition contains no specific requirements as to the term of the contract, the method of payment, the nature of the job or, indeed, the nature of the industry.

The definition of worker has often been considered by the courts. Originally, the existence of a worker - employer relationship depended on the degree of control which the employer exercised over the worker. The control test arose in the context of lawsuits in which the injured party tried to make the employer responsible for the acts of the worker. It made sense to consider the degree of control exercise by the employer over the worker in deciding whether to make the employer liable for the acts of its worker.

The application of the control test involved consideration of several factors which would indicate an exercise of control or a right to exercise control including:

1. Direct evidence of right or exercise of control
2. Method of payment
3. Furnishing of equipment
4. Chance of profit or loss

See Montreal v. Montreal Locomotive Works Ltd., et al (1947)1D.L.R. 161.

More recently, the control test has given way to the organization test. If the person performs duties that are an integral part of the employer's business, courts may infer that a worker - employer relationship has been established. The evolution of the organization test can be observed in the Ontario Court of Appeal decision, Mayer v. J. Conrad Lavigne Ltd., 27 O.R.(2d)129.

The trend by Canadian courts to adopt the organization test parallels the American movement away from the control test towards a relative-nature test. As stated by Larson in The Law of Workmen's Compensation:

"The modern tendency is to find employment when the work being done is an intergral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish an independent business or professional service."

If the control test is applied, more weight may be given to those factors which would determine the extent of the control by the employer over the worker. On the other hand, the organization test focuses more heavily on the extent to which the worker is performing duties which are essential to the employer. The Larson statement of the test would also require an examination of whether the worker carries on a business independent of the employer.

In our view, the organization test is more in keeping with a spirit and intent of Workers' Compensation legislation. The Workers' Compensation Act is intended to be remedial legislation and affords certain benefits to those individuals coming within its scope. The need for the employer to demonstrate control over the worker is much less of a factor in establishing entitlement under a Workers' Compensation no-fault scheme than would be the case where an employer is being sued for acts of one of its workers. We therefore are of the view that significant weight should be given to the way in which the worker does or does not fit into the employer's business. In this regard, the work performed by the worker and its relationship to the nature of the employer's business is more important than the extent to which the employer exhibits direct or indirect control over the worker.

The Board's published policies and guidelines set out a number of examples of employment situations which have been found to fall within or outside the Act. There would appear to be no published policies or guidelines setting out the general criteria to be applied by the Board in coming to decisions on these examples.

In this case, the evidence discloses that the worker had performed the duties of salesman for the employer from 1975 to 1980. Following a two year period of time in which the worker was a salesman for the employer's brother's paving company in Barrie, he again rejoined the accident employer in 1983, covering the Barrie region. Although he was placed on the payroll in 1983, the method of payment in 1983, as was intended in 1984, was on a commission basis. In 1984, his duties were essentially the same as those in 1983 and in our view, he was indeed an integral part of the employer's business. He was responsible for following up leads from the Barrie answering service and was given a company car with some form of gasoline allowance for this purpose. He supervised the jobs for which he obtained contracts and, regardless of whose version of the meetings in the Spring of 1984 and on August 2, 1984, one chooses to accept, it is clear that there was some agreement whereby the worker would be paid, after August, 1984, for the commissions earned on sales prior to August, 1984. Accepting the owner's testimony, the owner was going to place the worker on his payroll if the accident had not occurred. In our view, both the worker and the employer were treating the relationship as an employment one.

There is uncontradicted evidence that, in 1984, the worker devoted his attention exclusively to the employer's business and was not engaged in a sales function for other employers. This adds further support to our conclusion that the worker was a worker within the meaning of the Workers' Compensation Act at the time of his accident, notwithstanding the fact that he had not yet been placed on the payroll of the employer company. Whether or not he was on the payroll of the employer company, he had clearly entered into an oral contract of service with the employer in which it was understood that he would be paid for the commissions earned in 1984. He was devoting all of his work time in the furtherance of his employer's business.

Our conclusion is not contrary to the Board's examples of work situations which come within the meaning of the Act. According to the Board, the Act covers commission salesmen who sell exclusively for one employer. In our view, this is exactly the situation in which the worker found himself on August 7, 1984.

THE DECISION:

The appeal is allowed. The Tribunal leaves to the Board the determination of the amount of benefits arising out of the accident on August 7, 1984.

DATED at Toronto this 25th day of April, 1986.

SIGNED: J. Thomas, S. Acheson, D. Jago

CA24N
L95
- D21

Workers' Compensation Appeals Tribunal

DECISION NO. 155

Tribunal d'appel des accidents du travail

Panel Chairman: I. J. Strachan

Member: D. Beattie

Member: J. Connor



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

Telephone: (416) 962-1600

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 155

THE APPEALS PROCEDURE:

The worker appeals the decision of the Workers' Compensation Board Appeals Adjudicator, A.G Simpson, dated September 16, 1983, wherein the Adjudicator allowed the worker's claim for the period October 22, 1962, to November 19, 1962, for a back strain on an aggravation basis. The worker now seeks a ruling from the Tribunal that the accident of October 22, 1962, has resulted in on-going disability which may qualify the worker for a disability pension.

The Appeal was heard on March 26, 1986, by a Panel of the Appeals Tribunal consisting of I.J. Strachan, Panel Chairman, D. Beattie, a Tribunal member representative of workers and J. Connor, a Tribunal member representative of employers, (the "Tribunal").

The worker appeared and was represented by M. Falco of the WCB Advisor Office. The Employer was represented by J. Ford of the Law Firm McCarthy & McCarthy. The Tribunal was assisted by L. Gehrke of the Tribunal Counsel Office.

PRELIMINARY ISSUES:

Prior to dealing with the merits of the worker's Appeal it was necessary for the Tribunal to consider two preliminary matters: firstly the matter of a cross appeal by the employer and secondly, the question of the Tribunal's jurisdiction in this case.

I. CROSS APPEAL

Evidence indicated that the employer had filed a cross appeal with respect to the question of the worker's initial entitlement to benefits. However, this notice of cross-appeal, while delivered to the WCB, was not delivered to the worker and therefore the worker's representative was not in a position to argue the question of initial entitlement at the hearing.

After an examination of the record, the Tribunal agreed to an adjournment of the cross appeal since the worker had not received proper notice.

II. JURISDICTION

The Tribunal also considered the question of whether it had jurisdiction to hear the worker's appeal on the issue of on-going entitlement for recurring back problems leading to a permanent disability assessment.

The Tribunal examined the Case Description Materials together with the transcript of the Appeals Adjudicator hearing and noted the following:

- (a) The first reference to a claim for permanent disability appears to be contained in the worker's notice of appeal dated December 13, 1983, in which he advises that he wishes to appeal the Appeals Adjudicator decision dated September 16, 1983. The issue of a permanent disability does not appear to have been raised earlier in proceedings before the Board.

- (b) The worker's letter of October 5, 1982, requesting an appeal from the Claims Review Branch decision makes reference to several work stoppages due to recurring back problems. However, in the transcript of the hearing before the Appeals Adjudicator, the worker's representative at page 4 of the transcript advises the Appeals Adjudicator as follows:

"So from what I can see Mr. Chairman, the initial claim would be for compensation benefits to November 1962, and the probable recurrence relationship, of course, would not be an issue with you this morning."

- (c) The Case Description Materials indicate that the Board has not had the opportunity of ruling on the question of on-going entitlement or a permanent disability.

Under these circumstances, the Tribunal has concluded that the issues of on-going entitlement and permanent disability have not been dealt with by the Board. Indeed, as indicated above, the Appeals Adjudicator was advised that the issue was not before him at the hearing which resulted in the September 16, 1983, decision.

S.86g(2) of the Workers' Compensation Act (the "Act") reads as follows:

"The Appeals Tribunal shall not hear, determine or dispose of an Appeal from a decision, order or ruling of the Board unless the procedures established by the Board for consideration of issues respecting the matters mentioned in clause (1)(b) or (c) have been exhausted, and the Board has made a final decision, order or ruling thereon."

Since the Board has clearly not "made a final decision, order or ruling" on the question of on-going entitlement or permanent disability, the provisions of S.86g(2) have not been met and accordingly the Tribunal lacks the jurisdiction to hear the worker's appeal at this time.

DECISION:

1. The employer's Cross Appeal on the issue of initial entitlement is adjourned sine die on consent.
2. The worker's appeal of the decision of the Appeals Adjudicator based upon on-going entitlement or entitlement to a permanent disability pension cannot be heard by the Tribunal since the procedures established by the Board for consideration of the issues have not been exhausted as required by S.86g(2) of the Act.
3. This matter shall be returned to the Board at the Claims Review Branch level with the recommendation that the Board expedite a review of the worker's claim based upon on-going entitlement, taking into account the delay which has resulted from sending the appeal to the Tribunal.

4. In the event the worker's appeal is brought back to the Tribunal following final adjudication by the Board, the worker's appeal and the employer's cross appeal should be heard at the same hearing.
5. Naturally the worker and the employer still retain their respective rights of Appeal to this Tribunal after the Board's appeal procedure has been completed.

DATED at Toronto this 30th day of April, 1986.

SIGNED: I.J. Strachan, D. Beattie, J. Connor.

CA24N
L95
- D21

Commission
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Workers' Compensation Appeals Tribunal

DECISION NO. 160

Tribunal d'appel des accidents du travail

Panel Chairman: N. Catton

Member: S. Fox

Member: D. Jago



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

Telephone: (416) 962-1600

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 160

THE APPEALS PROCEDURE

The worker appeals the decision dated July 24, 1985, of the Appeals Adjudicator, D.R. McQueen. This decision confirmed the decision, dated October 29, 1984, of the Claims Review Branch.

The appeal was heard on January 20, 1986, by a Panel of the Tribunal consisting of N. Catton, Panel Chairman, S. Fox, a Tribunal member representative of workers, and D. Jago, a Tribunal member representative of employers.

The worker attended the hearing and was represented by R. Lebert of the UAW. The employer was represented by A. Krueger, Workers' Compensation Specialist. The Panel was assisted by E. Newman of the Tribunal Counsel Office.

At the hearing, the worker testified under oath. The Panel also considered the summary of facts contained in the Case Description as well as material attached to the description. In addition, the Panel had before it statements from co-workers and supervisors supplied by both the employer and the worker. At the hearing submissions were made by Mr. Lebert, Mr. Krueger and Ms. Newman.

Following the hearing the Panel also requested additional information from the WCB. Specifically the Panel could not locate a medical opinion referred to in the documents before it. This opinion was obtained from the Board. Both the employer and the worker were provided with copies but neither party chose to make further submissions on this information.

THE ISSUE AND HOW IT ARISES

A shoulder disability prevented the worker, who is employed by a car manufacturer, from performing his regular work between August 1984 and November 1984. The issue before the Panel is whether or not the worker is entitled to benefits from the WCB for this layoff.

There is no dispute that the worker suffered three accidents at work which affected his right shoulder. On all three occasions he was working with an air gun above shoulder level. The gun or the car he was working on jerked causing his shoulder to jerk. He did not lose any time from work because of the incidents in 1975 or in 1978. In 1977 he was off work for approximately five months because of a shoulder disability. When he did return to work he was advised by the orthopaedic specialist who was treating him, Dr. Bernstein, to avoid overhead work in the future.

After 1978 he did his regular job, but because of his seniority he was able to bid for jobs that minimized the amount of overhead work he was required to do. In late 1983 and early 1984 he was working on rear bumpers. This is a job he bid for. It did involve some overhead work. Although he knew that he should avoid overhead work he felt that the job was light enough. The job was subsequently changed to require more overhead work and as a result his shoulder became more painful. He was subsequently able to leave the rear bumper job. He attended the employer's

First Aid Clinic on April 19, 1984, because of continuing pain in the right shoulder. The worker continued with his employment until the annual plant shutdown at the end of July. He took two weeks holidays and thought that his shoulder would improve. When he returned to work his shoulder was no better and he sought the advice of his family physician who again referred him to Dr. Bernstein. Dr. Bernstein then prescribed medication and physiotherapy. When the physiotherapy treatment was completed the worker returned to work.

The Appeals Adjudicator denied the worker entitlement because he was not satisfied that there was sufficient evidence to establish a relationship between the previous accidents and the disability in 1984. In making this decision he relied on the advice of the Board's surgical consultant.

The questions before this Panel are:

1. Did the worker continue to suffer shoulder problems from 1978 until 1984 which could be attributed to the accidents at work?
2. Was the 1984 disability related to the injuries caused by the work accidents?
3. Were there any other contributory causes for the 1984 disability?

If the disability in 1984 was solely related to factors other than the compensable accidents, the worker would not have entitlement. However, if the 1984 disability resulted from the injuries caused by the previous work accidents, the worker would have entitlement to benefits.

THE PANEL'S REASONING

Although the worker did not seek medical treatment for about five years after the accident in 1978 the Panel is satisfied that there was an ongoing problem with the right shoulder. In support of this conclusion the Panel noted specifically:

1. The worker testified that he had ongoing problems and that he could avoid serious problems by limiting his overhead work. The Panel found the worker to be credible and accepts this evidence.
2. The worker also supplied the Panel with three statements of co-workers who confirmed the worker's ongoing complaints about shoulder problems. The Panel also received statements from two of the worker's previous supervisors who recalled complaints about pain and shoulder discomfort. The Panel was persuaded by the additional evidence that the worker continued to experience ongoing shoulder discomfort between 1978 and 1984.
3. Dr. Bernstein, who treated the worker after the 1977 incident, recommended that he avoid overhead work. In the Panel's view this recommendation by the doctor is an acknowledgement that the worker had an ongoing weakness or susceptibility to further problems resulting from the original accidents.

The Panel also considered the possibility that other factors may have contributed to the disability in 1984. In our view the work performed in 1983 and 1984 probably caused an aggravation of a pre-existing condition. There is no dispute that the worker did some overhead work. Whether it was strenuous or prolonged is open to debate. However it would appear that the work he did was stressful to someone with his weakened right shoulder. There was no other evidence available to the Panel to suggest that other factors contributed to the disability in 1984.

In this case the medical evidence is not particularly helpful to the Panel. The Board, when it denied the claim, relied on the advice of Dr. Young. Dr. Young's opinion simply reads "not related". No reasons or insight into the opinion were available to any adjudicators. Dr. Bernstein who treated the worker following the compensable accidents, did not specifically comment on the cause of the 1984 layoff, nor did Dr. Rock, another orthopaedic specialist who examined the worker in 1984.

The Panel finds that the worker has a compensable right shoulder disability which prevented him from working in 1984. The disability is compensable because the condition of his shoulder which made him prone to further periods of disability resulted from the original three accidents. It was further aggravated by the work in 1983 and 1984. The Panel finds that this relationship is supported by the worker's continuing complaints and is not negated simply because the worker did not seek medical attention. Dr. Bernstein, the specialist most actively involved in the worker's care, was unable to provide the worker with any active treatment and therefore there was no real need for the worker to seek his care. The worker is therefore entitled to benefits for the period when he was prevented from carrying out his regular duties because of treatment for the right shoulder.

DECISION

The appeal is allowed. The WCB is directed to determine the benefits payable to the worker subsequent to August 1984, when he was prevented from working while receiving treatment for the right shoulder.

DATED at Toronto this 25th day of April, 1986.

SIGNED: N. Catton, S. Fox, D. Jago

CA24N
L95
- D21

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Workers' Compensation Appeals Tribunal

DECISION NO. 161

Tribunal d'appel des accidents du travail

Panel Chairman: N. Catton

Member: N. McCombie

Member: D. Jago



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

Telephone: (416) 962-1600

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 161

THE APPEAL PROCEDURE

The employer appeals the decision dated April 10, 1985, of the Appeals Adjudicator, Mr. Kaliciak. This decision confirmed the Claims Review Branch decision dated August 10, 1984.

The appeal was heard, in Windsor, Ontario, on April 14, 1986, by a Panel of the Appeals Tribunal consisting of N. Catton, Panel Chairman, N. McCombie, a member of the Tribunal representative of workers, and D. Jago, a member of the Tribunal representative of employers.

The employer was represented by K. Owen, Safety Engineer. The worker attended and was represented by W. Eaton of his Union the UAW. The Panel was assisted by R. Nairn of the Tribunal Counsel Office.

The Panel read the Case Description recital of facts which were agreed to by the parties, as well as the attached documents. The worker gave evidence under oath at the hearing. Submissions were made by Mr. Owen, Mr. Eaton and Mr. Nairn.

THE ISSUE AND HOW IT ARISES

The worker suffered from otitis externa, which is an inflammation of the external ear canal. As a result of this condition he was unable to work for one day, April 27, 1984, because he had a soreness in both ears and severe hearing loss. He was treated by his family physician and returned to work on April 28, 1984, and has had no further problems with his ears.

The worker was employed as a sheet metal cutter. In April, 1984, he was working as a set up man. While performing his duties he wore cotton gloves which offered his hands some protection against metal filings, grease and oil. The gloves he used were not always new. Previously washed gloves are not as efficient in protecting hands from grease and oil as new gloves.

The worker also wore disposable foam ear plugs for hearing protection. To insert the ear plugs the employee would shape the plugs by rolling them with his fingers and insert them into his ears. During a normal day the worker would remove the plugs seven or eight times and replace them with a new pair. The worker contends that although he washed his hands each time he replaced the ear plugs a residue of oil and grease remained on his hands. The residual grease was transferred to the ear plugs and this dirt was the cause of the ear inflammation.

The worker's claim was originally denied by the Compensation Board but allowed by the Claims Review Branch in part on the basis of a report from Dr. Hilliard, the Board's consultant in Industrial Diseases.

The employer was dissatisfied with the Claims Review Branch decision and appealed the matter. The Appeals Adjudicator determined that:

"There is a distinct probability that the ear infection was caused by the handling of the ear plugs with soiled hands and that (the worker) did take the necessary precautions to try and keep his hands clean; since this probability exists the Adjudicator finds the benefit of reasonable doubt is extended to (the worker) and therefore it is concluded that the disability arose out of and in the course of employment and the claim was properly allowed".

The employer then requested a hearing before this Tribunal. The issue before the Panel is whether it is more likely than not there is a causal relationship between the work being performed and the ear inflammation.

THE PANEL'S REASONING

The employer submitted evidence that the company legally was required to provide hearing protection devices and did so conscientiously. Mr. Owen also advised the Panel that the hearing plugs were not allergenic and the Panel accepts this. In addition, Mr. Owen indicated that there were ample facilities in the work place for the worker to wash his hands before inserting the new plugs and the worker had been advised of the proper handling of these plugs. Mr. Owen submitted that if the inflammation resulted from carelessness on the part of the worker WCB benefits should not be payable. The Panel was also advised that the worker had suffered an injury to his ear in 1981. This information, together with the fact that otitis externa is a common condition which can be attributed to many causes, some of which are non-occupational, should, according to the employer, have caused the Panel to doubt the relationship between the work and the ear condition.

The worker did not disagree with the need for clean hands when inserting the plugs, but did indicate that the washing facilities on the shop floor offered only cold water. It was therefore not possible to remove all the oil and grease all of the time. The worker also denied any flu or cold symptoms in April, 1984, which could have commonly been the cause of such an ear condition. The worker also advised that Panel that his left ear had been bruised in a motor vehicle accident in 1981.

The Panel also considered the medical evidence which in this case is as follows:

1. Dr. Osborn, the worker's family physician, in a report dated April 30, 1984, indicated that the ear plugs at work irritated the ears. However, when contacted by phone in June, 1984, by an investigator employed by the WCB the doctor reportedly said that it was highly unlikely that the ear condition was work related because the condition was very common.
2. Dr. Smith, a physician employed by the WCB, in a brief memo in response to a Claims Adjudicator agreed with the Adjudicator's recommendation to deny the claim. No explanation for this opinion was given.

3. The most extensive opinion was provided by Dr. Hilliard, also employed by the WCB, who wrote:

"After some consideration, it is my medical opinion that this worker's bilateral otitis externa in all probability arose out of the frequent use of EAR plugs which were contaminated prior to insertion. I would recommend allowance of this claim for this acute episode."

In this case the Panel accepts:

1. The employer has properly and conscientiously provided hearing protection aids.
2. The worker normally washed his hands before inserting the plugs but it was unlikely that his hands were perfectly clean each time the plugs were inserted.
3. There is no evidence that the ear condition was attributable to other causes such as cold or flu.
4. There is no evidence to suggest that the bruising to the ear in 1981 contributed to the otitis externa, in both ears, in 1984.

The Panel does not agree with the employer that benefits should be denied if a worker is careless. This submission suggests that fault is an appropriate consideration in dealing with WCB claims. The WCB system was established to eliminate a fault system except in cases of "serious and wilful misconduct" of the employee claiming benefits. (Section 3(1)(b)).¹

The Panel does not dispute the employer submission that they had acted in accordance with the Safety Regulations and provided workers with adequate hearing protection and also provided training with the use of such protection. However, it cannot accept that a worker who inserts ear plugs with less than perfectly clean hands during the normal course of his day should be denied benefits. In the Panel's view there is nothing to suggest that the worker did not act in a reasonable manner and therefore his actions could not be considered serious and wilful misconduct.

Having assessed all of the evidence the Panel finds the Appeals Adjudicator's decision should not be disturbed. When applying the appropriate test, as the Appeals Adjudicator did, the Panel finds that the most probable cause of the ear inflammation was contaminated ear plugs. The fact that the ear plugs were not allergenic would not negate the possibility that they could become contaminated during the work day. We are also satisfied that it is more likely than not that after the worker washed his hands with cold water that there was still a residue of oil and grease. The Panel therefore finds that the worker suffered a disability, specifically otitis externa, which arose out of and in the course of his employment, and he is therefore entitled to benefits.

¹ Any reference to the Act refers to Workers' Compensation Act prior to the amendments of April, 1985.

DECISION

The appeal is dismissed.

DATED at Toronto, this 25th day of April, 1986.

SIGNED: N. Catton, N. McCombie, D. Jago

CA24N
L95
- D21

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Workers' Compensation Appeals Tribunal

DECISION NO. 163

Tribunal d'appel des accidents du travail

Panel Chairman: N. Catton

Member: F. Lankin

Member: D. Jago



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

May 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 163

THE APPEAL PROCEDURE

The worker appeals a decision dated October 29, 1985, of V.W. Ferguson, Appeals Adjudicator. This decision confirmed the decision of the Claims Review Branch dated October 29, 1982.

The appeal was heard on April 4, 1986, by a Panel of the Tribunal consisting of N. Catton, Panel Chairman, F. Lankin, a member of the Tribunal representative of workers, and D. Jago, a member of the Tribunal representative of employers.

The worker was represented by O. Buonastello. The worker did not himself attend the hearing as he has taken up permanent residence in Italy. The employer was notified of the hearing, but chose not to participate.

The Panel considered the Case Description and attachments. Mr. Buonastello provided the Panel with a medical report from Dr. P. Cecchini of Ficcarazzi Palermo, Italy, which described the worker's current condition as well as the discharge reports from the Board's Hospital and Rehabilitation Centre following treatment the worker received for a previous accident. The Panel also received a medical report dated June 10, 1981, from Dr. O. Casullo. The worker's son attended the hearing and gave evidence under oath. Mr. Buonastello made submissions.

THE ISSUE AND HOW IT ARISES

In June, 1976, the worker sustained a compensable knee injury for which he received benefits and a permanent disability award. In November, 1979, he secured employment with the accident employer with the assistance of the Board's Rehabilitation Department. His job involved sanding small plastic computer components.

On August 20, 1980, while working, the worker experienced shoulder pain after lifting a box weighing approximately 20 pounds. He left work immediately and was seen at the Emergency Department of a local hospital. A week later he saw his family physician, Dr. Shulman, who diagnosed a shoulder strain. The worker remained off work for about a year returning to his former job in September, 1981. During his layoff he received compensation benefits.

The worker is requesting temporary total benefits from October, 1981, until the present on the grounds that the disability which arose out of the accident in August, 1980, has continued to prevent him from returning to work. The questions to be addressed by this Panel are:

1. Is the worker's shoulder condition different then it was prior to the accident of August, 1980?
2. If so, is the shoulder disability sufficient to render the worker totally disabled?
3. If so, is the shoulder disability still properly categorized as temporary?

If the Panel were to find that the worker's shoulder disability after the termination of benefits in October, 1981, was worse than the condition of the shoulder prior to the work accident, the worker may be entitled to workers' compensation benefits and it would be necessary to answer the remaining questions. If the Panel were to determine that the shoulder condition had returned to its pre-accident condition before compensation ceased, there would be no further compensation payable because the ongoing condition could not be attributed to the work accident.

THE PANEL'S REASONING

The worker's representative argued that the worker had not returned to his pre-1980 accident state. In support of his decision Mr. Buonastello referred the Panel to a report from Dr. O. Casullo dated June 10, 1981, which indicated that it was unlikely that the worker would be able to return to work. Mr. Buonastello also referred to the discharge reports from the Board's Hospital and Rehabilitation Centre dated August 5, 1981. The report indicated that the worker should be restricted from lifting anything in excess of 10 kilos upon his return to work. This limitation had not been noted in the discharge reports following the worker's treatment for his knee injury in 1977.

Mr. Buonastello also argued that the worker's job in September, 1981, which involved sanding parts further aggravated his shoulder condition. In support of this position he referred to comments made by Dr. Shulman to the Board's staff. Dr. Shulman indicated that the arm movements required by the sanding could negatively affect the worker's degenerative disc condition.

In the Panel's view there is no doubt that the worker has had a significant problem with his shoulder and neck following the accident in 1980. The Panel must however, satisfy itself that a relationship exists between this condition and the accident at work.

There is a great deal of information before the Panel which indicates that the worker was experiencing neck and shoulder problems before the accident. On July 9, 1980, Dr. C.A. Laskin, a specialist in Rheumatology reported to Dr. Shulman that the worker was suffering from cervical spondylosis and early capsulitis involving the right shoulder. At that time, Dr. Laskin injected the worker's right shoulder. In October, 1980, following the accident, Dr. A. Chaiton a specialist in Rheumatology reported again to the family physician, that the worker's shoulder condition had not changed since May of that year. The worker's accident occurred in August.

The worker also complained to his supervisor of shoulder problems prior to August, 1980. This information is contained in the report of the Board's investigator. In the same report, the investigator documented a conversation with a co-worker of the injured worker who said that the worker had complained of neck and shoulder problems prior to the August incident.

The Panel also considered a report dated January 3, 1983, from Dr. S.Y. Gershon who wrote:

"I think it is clear this gentleman is dealing with many painful joints and it seems that all of them are the result of chronic trauma that has evolved slowly over the years. The final job of sanding small plastic parts one might suggest was the "straw that broke the camel's back". Clearly all of these joint complaints, his knee, his thumb, his back, his shoulders, his neck, are work-related."

In the Panel's view, there is no doubt that the worker is disabled and that because of shoulder and neck problems he would have had difficulty with the sanding job. However, the Panel cannot accept that the ongoing disability is related to the accident in August, 1980. Prior to the incident the worker was experiencing significant discomfort and sought medical attention and treatment for his shoulder problems. There is no evidence, either on X-rays or specifically from physicians that would indicate that the strain caused further damage to the joints. Although Dr. Gershon relates the worker's disability in all of his joints, which include his knees and shoulders, to his work, it is apparent from the report that the connection is between his work over the last twenty years and not the accident in 1980. In the Panel's opinion, the worker is suffering from a progressive condition which was apparent at the time of the accident and was not accelerated by the accident. The worker is therefore not entitled to additional compensation benefits.

DECISION

The appeal is dismissed.

DATED at Toronto this 15th day of May, 1986.

SIGNED: N. Catton, F. Lankin, D. Jago.

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Workers' Compensation Appeals Tribunal

DECISION NO. 166

Tribunal d'appel des accidents du travail

Panel Chairman: I. Strachan

Member: C. Comeau

Member: L. Heard



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

June 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 166

THE APPEAL PROCEDURE

The employer appeals the January 30, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, S. Rudderham, which decision concluded that the worker's hearing loss was related to noise exposure arising out of his employment with the employer.

The appeal was heard in Toronto on April 8, 1986, by a Panel of the Appeals Tribunal consisting of I. Strachan, Panel Chairman, C. Comeau, a member of the Tribunal representative of employers, and L. Heard, a member of the Tribunal representative of workers (the "Tribunal").

The employer appeared and was represented by E. Parsonage, the employer's Safety Co-ordinator and T. Carroll from the Employers' Adviser Office. The worker appeared and was represented by E. Pukitis, of the WCB Workers' Adviser Office.

The Panel had before it the Case Description Materials.

PRELIMINARY ISSUES

The Tribunal determined that there were two issues relating to the worker's hearing disability:

1. The first issue was whether the worker's hearing loss related to noise exposure and arose out of his employment.
2. The second issue is whether the worker is entitled to a permanent pension for that hearing loss, and if so, how should that pension be calculated.

It was argued by the employer's representative that issue number 1 was properly before the Tribunal; however, the Tribunal lacked jurisdiction to hear an appeal with respect to issue number 2, because the WCB procedures for determination of the issue had not been exhausted. Since the provisions of section 86g(2) of the Act had not been complied with, the Tribunal lacked jurisdiction to hear an appeal on the second issue.

Section 86g(2) reads as follows:

"(2) The Appeals Tribunal shall not hear, determine or dispose of an appeal from a decision, order or ruling of the Board unless the procedures established by the Board for consideration of issues respecting the matters mentioned in clause (1)(b) or (c) have been exhausted, and the Board has made a final decision, order or ruling thereon."

The Tribunal heard argument from the employer's representative, the worker's representative and Tribunal counsel. The Tribunal also examined the Case Description Materials - in particular the June 17, 1985, letter of the Adjudication Branch advising that the worker was not eligible for a pension under the claim, and the August 13, 1985, letter of the Claims Review Branch advising that a pension was awarded in recognition of hearing loss.

THE PANEL'S REASONING

With respect to issue number 1 (hearing loss caused by job-related noise), the Tribunal was satisfied that this issue was properly before the Tribunal as a result of the Appeals Adjudicator decision.

With respect to issue number 2 (the pension award), the Tribunal determined that the provisions of section 86g(2) had not been complied with since the Board procedures established for determination of the issue had not been exhausted.

DECISION

Accordingly the Tribunal made the following order:

1. The appeal on issue number 1 is adjourned pending a final determination by the Board on issue number 2.
2. Issue number 2, is referred back to the Board for a final determination.
3. The employer's representative shall contact the Board to expedite the determination of issue number 2.
4. The parties shall advise the Tribunal forthwith when a final determination of issue number 2 has been made by the Board.
5. In the event the Board's final determination of issue number 2 is appealed to the Tribunal, issue number 1 and issue number 2 shall be heard together by the same Panel.

DATED at Toronto, this 9th day of June, 1986.

SIGNED: I. Strachan, L. Heard, C. Comeau.

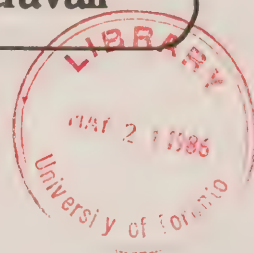
CA24N
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Communication

Workers' Compensation Appeals Tribunal

DECISION NO. 171

Tribunal d'appel des accidents du travail



Panel Chairman: R. Hartman

Member: N. McCombie

Member: C. Comeau

LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

Telephone: (416) 962-1600

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 171

INTERIM RULING:

A Case Direction Panel of the Appeals Tribunal was convened on April 10, 1986, to consider certain jurisdictional and procedural matters arising out of an appeal by a worker of a decision dated March 18, 1985, of J.V. D'Andrea, Appeals Adjudicator.

The Case Direction Panel consisted of R. Hartman, Panel Chairman, N. McCombie, a member of the Tribunal representative of workers, and C. Comeau, a member of the Tribunal representative of employers. L. Gehrke of the Tribunal Counsel Office assisted the Case Direction Panel. The worker's representative, J. Martin, and the employer's counsel, M.L. Timms, were present and submitted arguments with respect to the issues.

THE ISSUE AND HOW IT ARISES:

On April 10, 1986, at the commencement of a scheduled hearing before a Hearing Panel, the worker's representative and the employer's counsel sought to introduce numerous materials in addition to the Case Description Materials prepared by the Tribunal Counsel Office. There was no agreement between the worker and employer representatives with respect to these additional materials. The worker's representative stated that the materials sought to be introduced by the employer's counsel appeared to raise additional issues, thus necessitating extra documentation in response. The employer's counsel took exception to some of the materials proposed in response and stated the employer was not prepared to proceed if these were allowed to form part of the record.

It was apparent to the Hearing Panel that the parties were not in agreement with respect to the issues on appeal. Questions by the Panel with respect to what issues were before it confirmed this. After hearing submissions from the parties, the Panel concluded that it would be more appropriate, given the strong objections regarding the introduction of materials and the dispute with respect to issues, to have the matter referred to a Case Direction Panel. Both the employer and worker representatives were invited to be present and make submissions to the Case Direction Panel with respect to what each felt were the relevant issues arising out of this appeal by the worker.

The hearing was adjourned. The members of the Hearing Panel were designated as a Case Direction Panel. Thus reconstituted, the Panel reconvened. All witnesses were excluded and the meeting proceeded informally.

At the Case Direction Panel meeting, the following issues arose:

1. Was there a finding in the decision by the Appeals Adjudicator with respect to entitlement? Was entitlement, either as a new accident or as an aggravation, of prior compensable injuries, properly before the Tribunal as an issue or did S.86(g)(2) apply?

2. If there was a finding by the Appeals Adjudicator with respect to entitlement under the Act, on what basis did he conclude there was no compensation flowing therefrom?

THE PANEL'S REASONING:

The Case Direction Panel concluded that there was a finding by the Appeals Adjudicator of entitlement by the worker on the basis of an aggravation of a compensable injury "as a result of movements performed in the course of his job on March 1, 1984". There was no finding that a new compensable injury occurred on March 1, 1984. The worker's representative confirmed that the worker had not made such a claim. The employer's counsel submitted it was up to the worker to commence such a claim by returning to the WCB.

From the decision of the Appeals Adjudicator it appeared that, after finding entitlement, he was of the opinion that no compensation flowed from such entitlement as the worker was not disabled beyond that percentage recognized in his permanent disability award prior to March 1, 1984, and that the worker disqualified himself from benefits under Section 41(1)(b) by claiming total disability and the medical records indicated that it was no greater than the percentage of his permanent disability award.

Given that in the worker's appeal the issue is one of compensation flowing from entitlement, materials or argument designed solely to dispute or establish entitlement on the basis of events on March 1, 1984, were not relevant to a determination of the compensation issue.

The Case Direction Panel noted that it was open to the employer to cross-appeal the entitlement aspect of the decision and in the interest of consolidating proceedings arising out of the same decision, steps could be taken to have the employer's appeal with respect to entitlement heard at the same time as the worker's appeal with respect to compensation.

We therefore direct the Tribunal Counsel Office to return all materials submitted and tentatively marked as Exhibit #1 to #7, to the worker's representative and the employer's counsel. The hearing on the merits will be before a separate Hearing Panel. Prior to this hearing, it is suggested that the worker's representative and employer's counsel work through the Tribunal Counsel Office and address which materials should be included in the Case Description Materials on the issue of compensation flowing from entitlement on an aggravation basis. If the employer cross-appeals and the hearings are consolidated, the materials could also address the issue of entitlement and whether it was established by events on March 1, 1984.

DATED in Toronto on this 21st day of April, 1986.

SIGNED: R. Hartman, N. McCombie, C. Comeau

Workers' Compensation Appeals Tribunal

INTERIM RULING MATTABI MINES LIMITED

Tribunal d'appel des accidents du travail

(Faint handwritten text, possibly a file number or date)



Panel Chairman: J. Thomas

Member: N. McCombie

Member: D. Mason

LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

February 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

Telephone: (416) 962-1600

WORKERS' COMPENSATION APPEALS TRIBUNAL

BETWEEN:

Mattabi Mines Limited

- and -

Frank Leonard

(an employer appeal)

AND BETWEEN:

Gaetan Tremblay

- and -

H. T. Leasing Thunder Bay Ltd. et al.

(a S.15 application)

AND BETWEEN:

Terry Robert Newman

- and -

H. T. Leasing Thunder Bay Ltd. et al.

(a S.15 application)

AND BETWEEN:

George David King

- and -

H. T. Leasing Thunder Bay Ltd. et al.

(a S.15 application)

AND BETWEEN:

David Eby

- and -

H. T. Leasing Thunder Bay Ltd. et al.

(a S.15 application)

INTERIM RULING

A Case Direction Panel of the Appeals Tribunal was convened on February 14, 1986, to consider certain procedural matters arising out of

four Section 15 applications and one employer appeal related to the same accident. The Case Direction Panel consisted of J. Thomas, Panel Chairman, N. McCombie, a member of the Tribunal representative of workers, and D. Mason, a member of the Tribunal representative of employers. E. Newman of the Tribunal Counsel Office assisted the Case Direction Panel.

THE ISSUE AND HOW IT ARISES:

Thirty-three employees of a mining company were injured when a bus operated by H. T. Leasing Thunder Bay Ltd., which was chartered by the mining company, was involved in an accident on March 7, 1983. Thirty-two workers elected to claim workers' compensation benefits and their claims for benefits were allowed by the Workers' Compensation Board. One worker, Tremblay, elected to sue the leasing company and others rather than claim benefits under the Workers' Compensation Act.

On several occasions, the Workers' Compensation Appeal Board was asked during the course of the Tremblay legal proceedings to determine whether Tremblay's right to sue was taken away by the Act. It is not necessary for the purposes of this ruling to examine proceedings before the Appeal Board except to indicate that by a decision dated September 27, 1985, the Appeal Board ordered a rehearing of an application under Section 15 of the Workers' Compensation Act to determine whether Tremblay's right to sue has been taken away by the Workers' Compensation Act. It is that order which gives rise to the Tremblay Section 15 Application which is currently before this Appeals Tribunal.

Employees Newman, King, and Eby, although originally electing to claim benefits under the Workers' Compensation Act have more recently commenced law suits against the leasing company and others. These law suits have also given rise to Section 15 applications to determine their respective rights to sue arising out of the same accident.

By way of a test case, the employer has appealed the Board's decision to award benefits to the employee Leonard, who was also injured in the same accident and elected to claim benefits. In the Leonard matter, a WCB Appeals Adjudicator decided that the accident arose out of and in the course of employment, and therefore dismissed the appeal by the employer as to Mr. Leonard's entitlement to benefits. From that decision the employer appeals to this Tribunal.

At the Case Direction Panel meeting, the following issues arose:

1. Is it necessary or appropriate to determine the four Section 15 applications and the employer appeal at the same hearing of the Appeals Tribunal?
2. To whom should notice of the Section 15 applications or the employer appeal be given?

THE PANEL'S REASONING:

The Case Direction Panel concludes that the four Section 15 applications and the employer appeal should be heard together. All of the proceedings arise out of the same accident. More importantly, there would appear to be a commonality of issues in the proceedings. In the Section 15 application, the issue before the Appeals Tribunal is whether the employee's right to sue has been taken away by the Act. To determine this issue, the Appeals Tribunal will have to decide whether the accident was one which arose out of and in the course of employment. That is precisely the issue which will fall to be determined in the employer appeal with respect to entitlement to benefits by Mr. Leonard. For the employer to succeed on the Leonard appeal, it would have to establish that Mr. Leonard's injuries did not arise out of and in the course of his employment.

We are of the view that the Tribunal should, wherever possible, consolidate proceedings which arise out of the same accident to minimize the costs of the proceedings and to avoid inconsistent determinations.

We are further of the view that all of the other workers who were injured in the same accident and who claimed benefits should be given notice of these proceedings. Although these individuals are not parties to the Section 15 applications or to the employer appeal, they have a substantial interest in the outcome of the proceedings. If the Appeals Tribunal were to conclude that the accident did not arise out of and in the course of employment, thereby allowing the employer appeal and also declaring that the right to sue has not been taken away by the Act, it would quite possibly be open to the Board, of its own motion, to reconsider the issue of entitlement to benefits for all of the other workers who were involved in the same accident and who elected to claim compensation. Indeed, the employer's decision to bring forward the Leonard appeal by way of a test case suggests that the employer may well require the Board to take action with respect to other claims if it is successful in the Leonard appeal. The giving of notice to all of the other workers who were involved in the accident will give them the opportunity to be heard by the Appeals Tribunal and to make representations on the issue of whether the accident arose out of and in the course of employment should they wish to do so.

We, therefore, direct the Tribunal Counsel Office to notify all the other workers who were involved in the accident of March 7, 1983, by distribution of the attached notice or otherwise. We understand that one of the Section 15 applications was scheduled for March 4, 1986. We order that this hearing date be adjourned to the end of April, 1986, so that the other workers involved in the accident will have an adequate opportunity to decide whether they wish to participate in these proceedings.

DATED in Toronto this 24th day of February, 1986.

SIGNED: J. Thomas, N. McCombie, D. Mason

WORKERS' COMPENSATION APPEALS TRIBUNAL

N O T I C E

OF

APPLICATION UNDER SECTION 15 OF THE WORKERS' COMPENSATION ACT

BETWEEN:

Mattabi Mines Limited

- and -

Frank Leonard

AND BETWEEN:

Gaietan Tremblay, Terry Robert Newman, George David King, and David Eby

- and -

H. T. Leasing Thunder Bay Ltd. et al.

TO THE EMPLOYEES OF MATTABI MINES involved in a bus accident on March 7, 1983:

Applications have been made to the Appeals Tribunal to determine whether the rights of employees Tremblay, Newman, King and Eby to sue for damages for injuries sustained in a bus accident on March 7, 1983 have been taken away by the Workers' Compensation Act.

Also, Mattabi Mines Limited has applied to the Appeals Tribunal to determine whether one particular employee (Leonard) had the right to workers' compensation benefits for injuries sustained in that bus accident.

A decision by the Appeals Tribunal in these cases could affect your rights to sue or to receive workers' compensation benefits for injuries sustained in that bus accident.

THEREFORE TAKE NOTICE that a hearing by the Appeals Tribunal of these applications will take place on Monday and Tuesday the 28th and 29th days of April, 1986.

If you thing you might be affected by these applications and you wish to attend or wish to make representations at the hearing of these applications, you should, before March 31, 1986, send a letter to the Appeals Tribunal indicating that you intend to attend the hearing. Please include in your letter your mailing address and your telephone number.

Send your letter to:

Tribunal Counsel Office
Workers' Compensation Appeals Tribunal
920 Yonge Street, Suite 200
Toronto, Ontario M4W 3C7
Attention: Elaine Newman

Since these applications have raised significant legal issues, you might wish to consult a lawyer or a representative familiar with workers' compensation.

DATED at Toronto this 10th day of March, 1986.

SIGNED: J. Thomas



Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

CA24N
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- D21

DECISION NO. 172

Panel Chairman: N. Catton

Member: S. Fox

Member: J. Connor

June 1986

RESEARCH AND PUBLICATIONS DEPARTMENT

Workers' Compensation Appeals Tribunal

505 University Avenue, 7th Floor, Toronto, Ontario M5G 1X4
(416) 598-4638

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 172

THE APPEAL PROCEDURE

The employer appeals the September 28, 1984, decision of the Workers' Compensation Appeals Adjudicator, D.R. Queen. This decision overturned a decision of the Claims Review Branch dated July 7, 1983.

The appeal was heard on April 10, 1986, by a Panel of the Appeals Tribunal consisting of N. Catton, Panel Chairman, S. Fox, a member of the Tribunal representative of workers, and J. Connor, a member of the Tribunal representative of employers.

The employer was represented by H. Goldfinger. Also present was C. Goldfinger, owner of the company. The worker appeared and was represented by M. Tzaferes from the Office of the Worker Adviser. An Italian interpreter was present to assist the worker. The Tribunal was assisted by J. Marshall, a member of the Tribunal Counsel Office who appeared in the role of Tribunal counsel.

The Panel heard and considered evidence given under oath by the worker and by Mr. C. Goldfinger in oral testimony and read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials.

THE ISSUE AND HOW IT ARISES

The worker was employed by the same garment manufacturer, as a sewing machine operator for the four years. On March 16, 1983, during his shift he stood up to leave his machine. There was a heavy metal box to the right of his machine which he had to move before leaving. The worker claims that as he bent down to move the box, he coughed and developed an acute pain in his mid-low back.

The worker testified that he completed his shift and reported his injury to C. Goldfinger, the owner of the firm, who ignored him. He then reported the injury to Mr. John Szilagyi, the foreman, who also paid no attention. He worked two more days, completing the week and did not return to work the following week.

The worker saw his family physician on March 19, 1983, and was diagnosed as having a lumbar strain. He continued seeing his family physician who referred him to Dr. G.S. Conn, an orthopaedic surgeon, in July, 1983. Dr. Conn who was of the opinion that the worker suffered an acute strain to his back and that the disability was probably discogenic in origin.

On July 7, 1983, the Claims Review Branch denied entitlement to the worker because an accident at work had not been established and even if an accident had occurred the subsequent disability did not result from that accident.

The decision was appealed to the Appeals Adjudicator who found that the worker injured his back as a result of an accident as defined by section 1(1)(a)(iii) of the Workers' Compensation Act and was entitled to benefits. The worker received temporary compensation benefits for periods of disability from March, 1983, to May, 1985. On January 6, 1986, the worker was assessed for permanent disability pension and was awarded ten per cent permanent pension.

The employer appealed the decision of the Appeals Adjudicator to the Tribunal.

The issue before the Panel therefore is whether the worker suffered a personal injury by accident on March 16, 1983, while working for the employer and whether his subsequent back problems were related to that accident.

THE PANEL'S REASONING

The employer submitted that the worker had knowledge of an imminent lay off and therefore fabricated an accident in order to receive Workers' Compensation benefits. Workers' Compensation benefits are higher than Unemployment Insurance benefits. In support of this position Mr. C. Goldfinger testified that when he told the worker of the possible lay off the worker requested that Mr. Goldfinger indicate that he was ill on the separation certificate. Mr. Goldfinger advised the Panel that he was willing to do this in an effort to help a long term employee.

The worker denied this sequence of events. He testified that he had reported the accident to Mr. Goldfinger and the foreman Mr. J. Szilagyi on March 16, 1983, and was ignored by both men.

On June 13, 1983, a Board investigator interviewed the foreman. The foreman acknowledged that the worker had complained about back pain but the worker had not related a cause of that pain.

In addition to this evidence the Panel had before it two copies of records of employment for unemployment insurance purposes. Both certificates were signed by Mr. C. Goldfinger and both were dated March 22, 1983. They were sequentially numbered. On the first certificate the reason circled for separation was illness or injury and noted that the worker would be recalled. The second certificate stated that the reason for separation was lack of work.

When questioned about this inconsistency Mr. Goldfinger said that a week after the worker laid off he heard that the worker had claimed compensation. He then altered the reason on the separation form. The employer explained the change in the reason was his realization that a Workers' Compensation claim could raise his firms assessment. Although he was prepared to be of assistance to a long term employee he was not prepared to do this at any cost to his firm.

At the hearing when asked to provide details about the lay off that was to affect the worker, the employer was not able to provide the Panel with additional information. The employer indicated that his business was up and down and lay offs were not uncommon. He had no specific information concerning the number of workers that would have been affected by the lay off.

The decision in this case rests with the Panel's assessment of the credibility of the parties.

The Panel does not accept the explanation of events offered by the employer. According to the evidence available to the Panel the first knowledge that the WCB had of the accident was a doctor's report which it received on April 21, 1983. When the employer was contacted by the Board on May 20, 1983, Mr. Goldfinger said he had no knowledge of the claim. The Panel is of the view that this analysis seriously calls into question Mr. Goldfinger's evidence about his decision to change the separation certificate. There would have been no reason for him to

change the certificate one week later if he had no knowledge of the claim until May of 1983. The Panel also noted that Mr. Goldfinger certified by his signature the accuracy of the information contained in the two contradictory separation certificates.

In respect to the worker's evidence, the Panel notes that the worker's history of accident has been consistent. The history described to his doctor on March 19, 1983, the Board in his report of accident dated May 6, 1983, and his statements to the Board's investigator in June, 1983, are consistent. The Panel also notes that the worker's family doctor found him to have been disabled three days after the accident.

The Panel is not persuaded by the employer's evidence and accepts the worker's evidence. There is therefore no reason to disrupt the Appeals Adjudicator's decision.

DECISION

The appeal is dismissed.

DATED at Toronto, Ontario this 26th day of June, 1986.

SIGNED: N. Catton, S. Fox, J. Connor.

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Publication

Workers' Compensation Appeals Tribunal

DECISION NO. 179

Tribunal d'appel des accidents du travail

Panel Chairman: A. Signoroni

Member: B. Cook

Member: R. Apsey



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

May 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

Telephone: (416) 962-1600

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 179

THE APPEAL PROCEDURE

This is an appeal by the worker of the June 24, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, T.D. Allamby. Mr. Allamby's decision affirmed the decision of the Claims Review Branch dated June 1, 1984.

The appeal was heard on April 15, 1986, by a Panel of the Appeals Tribunal consisting of A. Signoroni, Panel Chairman, B. Cook, a member of the Tribunal representative of workers, and R. Apsey, a member of the Tribunal representative of employers.

The worker appeared and was represented by Larry Ladd, a Service Representative of the United Auto Workers. The employer had notice of the hearing and elected not to appear.

The Panel heard and considered evidence given under oath by the worker and read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description materials filed at the hearing. The Panel also read the Case Description recital of facts prepared by the Tribunal's Counsel Office and agreed to by the worker. The Panel heard submissions from Mr. Ladd.

THE ISSUE AND HOW IT ARISES

Some time in early 1984, the worker developed a pea-sized glomus tumour on his right ring finger. The worker had consistently related this condition to his employer and specifically to the work done one particular day in mid-January, 1984.

The Appeals Adjudicator found that the tumour was not compensable and stated that he was guided by the medical evidence which consisted of opinions from a Board Surgical Consultant and Dr. Hampole, a plastic surgeon.

THE PANEL'S REASONING

The worker is employed as a general repair man in a car assembly plant. His job is to replace defective parts on cars coming off the assembly line. On a day in mid-January, 1984, due to a scheduling mistake, the tires on approximately thirty cars had to be replaced. Although changing tires is a regular feature of the worker's job, on this particular day he did virtually nothing but change tires. This process involves lifting the car with a hoist, removing the tires, and placing new tires on the car. To do this, the worker would place the four fingers of his right hand into the hole in the centre of the hub to lift the tire up to the car. The worker testified at the hearing that while lifting one particular tire he felt a sudden onset of pain which he described as being like a rip or a burning sensation in his finger. He continued, however, to change tires for the rest of his shift. He was also able to continue to perform his regular job as a general repair man for quite some time. The pain, however, according to the worker, got gradually worse. The worker visited his family doctor, Dr. Hobbs, on February 20, 1984, and Dr. Hobbs in turn referred the worker to Dr. Hampole, the plastic surgeon who ultimately performed surgery involving the removal of the tumour on March 22, 1984.

On February 28, 1984, approximately one week after visiting his family doctor, the worker reported the problem to the First Aid Department of his employer. The nurse in the First Aid Department recorded "gradual onset of pea-sized lump right ring finger between first and second knuckle." This information was subsequently transferred to the employer's report of accident which was sent to the WCB on February 29, 1984.

In May, 1984, Dr. Macfarlane, a WCB surgical consultant, was asked to review the claim and give a medical opinion as to the compensability of the tumour. Dr. Macfarlane noted, in Memo #11, that "there is no known cause for glomus tumour but trauma may be an activating factor - claim might be acceptable on aggravation basis." The claims review specialist who had asked Dr. Macfarlane for the opinion then found, as a matter of fact, that there had been no trauma to the worker's right finger. This finding of fact appears to the Panel to have been reasonable, given that the evidence available to the review specialist at the time came from the employer's report of accident which mentioned a gradual onset rather than a specific incident. Dr. Macfarlane was then asked for a further medical opinion as to whether the claim should be allowed or denied noting the absence of any mention of trauma. Dr. Macfarlane replied in Memo #13 that "in the absence of trauma would agree with denial."

The matter then proceeded to a hearing before the Appeals Adjudicator who directed that a Board investigator conduct a further investigation.

The investigator spoke to a number of people at the worker's place of employment including the worker's immediate supervisor. This individual informed the investigator that the worker had related the onset of the disability to changing tires on a day in mid-January and also that the worker had experienced a "tear" in the finger upon lifting a specific tire. When the investigator spoke to the worker, his notes record that the worker "states that while lifting a tire rim assembly using the right hand he experienced a sudden onset of a burning pain affecting the right ring finger."

The Panel notes that this evidence is consistent with the evidence which the worker provided at the hearing under oath. While there is some evidence in the Board's file that the worker has on occasion related the disability to the general activity of changing tires rather than to a specific incident, the Panel does not believe that this is a serious inconsistency. The Panel believes that it is more probable than not that the worker first injured his right finger while lifting a specific tire and that this original injury was aggravated by continuing to change tires for the duration of the shift and quite possibly by the worker's general work which he performed until he discontinued work for the surgery.

The Panel notes the opinion of Dr. Macfarlane, the Board's surgical consultant, and of Dr. Hampole, the plastic surgeon, to the effect that while trauma might activate or aggravate a glomus tumour it could not cause the tumour. In light of this evidence, therefore, the Panel concludes that the tumour was a pre-existing condition which was aggravated by the specific incident and further aggravated by the general nature of the worker's job.

DECISION

1. The appeal is allowed.
2. The Panel finds, on a balance of probabilities, that the worker suffered a compensable injury to his right ring finger on a date in mid-January, 1984. The Panel finds that a specific incident occurred when the worker lifted a tire. This aggravated a pre-existing tumour. The injury was further aggravated by the work being performed by the worker on the same day in mid-January.
3. The accident caused an aggravation of a pre-existing non-compensable tumour. In accordance with the Board's policies in such matters, the worker is entitled to temporary compensation benefits for the acute period of disability which in this Panel's view is from March 21, 1984, when the worker discontinued work for the surgery until April 23, 1984, when the worker returned to work.

DATED at Toronto this 6th day of May, 1986.

SIGNED: A. Signoroni, B. Cook, R. Apsey.



Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail



CA24N
L95
- D21

DECISION NO. 187

Panel Chairman: J. Thomas

Member: N. McCombie

Member: D. Jago

June 1986

RESEARCH AND PUBLICATIONS DEPARTMENT

Workers' Compensation Appeals Tribunal

505 University Avenue, 7th Floor, Toronto, Ontario M5G 1X4
(416) 598-4638

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 187

THE APPEAL PROCEDURE

The worker appeals the April 3, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, F.H. Kaliciak which denied the worker entitlement to temporary total disability benefits from November 14, to November 28, 1983, on the grounds that the work being performed by the worker at the time of her alleged onset of back pain was within her medical restrictions.

The appeal was heard at Windsor, on April 17, 1986, by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, N. McCombie, a member of the Tribunal representative of workers, and D. Jago, a member of the Tribunal representative of employers.

The worker appeared and was represented by L. Deardale from the UAW. The employer, an automotive manufacturer, was represented by A. Langlois, a Benefit Planner Representative with the employer company. The Panel was assisted by E. Newman from the Tribunal Counsel Office.

The Panel had before it a Case Description containing a summary of the claim and relevant documents from the WCB file. At the hearing, the worker's representative provided the Panel with a note from Dr. Ziter dated April 14, 1986. The employer's representative provided the Panel with a medical restriction form. Both documents were marked as exhibits.

The worker and a co-worker testified under oath and submissions were made by the worker and employer representatives and Tribunal counsel.

THE ISSUE AND HOW IT ARISES

The worker injured her low back in an accident on June 7, 1982. Except for a one month period around December, 1982, she remained off work because of her low back disability until April 19, 1983. While she was off work she received Workers' Compensation benefits. Following her return to work in April, 1983, she was successful in obtaining a light work job called a "tack down job" which was within her medical restrictions. This job consisted of sewing together a few pieces of very light material.

On Monday, November 7, 1983, she was transferred to a new pilot project which involved sewing together pieces of carpet material. She told the Panel that as the week progressed, she experienced increasing pain in her low back. Prior to being placed on the pilot project, she told the Panel that, although her back had not completely recovered, it was getting better and she was able to perform the tack-down job without difficulty.

By Friday, November 11, 1983, her back had become so painful that she went to see her family doctor, Dr. Ziter, who advised her to stay off work for two weeks. The worker remained at home until November 28, 1983, when she returned to work and was placed back on the tack-down job.

The issue before this Panel is whether the worker is entitled to benefits for the period of November 14, to November 28, 1983.

The employer representative requested the Panel to make a finding if the appeal were allowed, that the employer is entitled to relief under the Second Injury and Enhancement Fund on the grounds that there is some evidence of a pre-existing condition.

THE PANEL'S REASONING

The worker's request for compensation was denied by the Claims Review Branch and by the Appeals Adjudicator on the grounds that the pilot project was within the worker's medical limitations and restrictions. Those restrictions, which were effective April 18, 1983, required the worker to avoid lifting more than 15 pounds, and to avoid repetitive rotation and extension of the neck.

The worker told the Panel that the pilot project involved pieces of carpet that weighed somewhere between 4 and 5 pounds. She indicated that it was difficult to put the material into the sewing machine because it would not easily fit under the foot of the sewing machine. In order to sew around corners, she had to grab the material with both hands and turn it under the foot of the machine. When she was finished with the carpet, she dropped it on the floor in front of the machine and after a number of pieces had collected on the floor, she would sometimes have to go and pick up the pieces and put them on a cart. On other occasions, she would get help with the lifting of the pieces of carpet.

Although she was not busy for the first two days of the pilot project, she indicated that on Wednesday, Thursday, and Friday of that week there was steady and continuous work.

The first onset of pain occurred on the first day that she started the pilot project. The next day, she felt that she couldn't continue with the job and went to see the plant nurse. The plant nurse called her foreman who said that she should be able to continue the job because it wasn't heavy and there weren't many pieces to work on. The nurse told her that she would require a note from her doctor to get off the job.

The worker continued to perform the pilot project for several more days but eventually went to her family doctor who gave her a note to get off the job. She told the Panel that she gave the note to her foreman or to the plant nurse.

At some point during the week, in response to complaints by the worker, her job was observed by the company physician who concluded that the job was within the worker's restrictions. There was some dispute as to whether the machine was working at the time the job was examined by the company physician. A co-worker testified that she remembers the company physician coming into the area to examine the job. A red light above the machine had been turned on indicating that the machine was not working.

A report from the worker's family doctor dated February 5, 1984, confirms that the worker was off work on doctor's orders from November 12, to November 28, 1983.

A portion of the February 5, 1984, report is as follows:

"(The job) required a lot of bending and twisting motion and this exacerbated her pain. During that time period, of November 12, until the 28, she was advised to stay home, to rest, and to put heat locally to the area and to take Voltaren 50 mgs. tid as anti-inflammatory agent. She improved and was able to return to work following this short period of disability. This patient has been seen by several orthopaedic surgeons and neurologists and recently went to London to see Dr. Barr who felt that she indeed had a mechanical type of low back pain which may require her to doing modified type of job which required no repeated twisting or bending or lifting. Hence I feel that this lady had a genuine compensable injury but that she has been able to do modified work and will continue to be able to do this type of work at least for the foreseeable future."

A note from Dr. Ziter dated April 14, 1986, states:

"This women had an acute exacerbation of low back pain (November 12-28/83) due to job change."

The employer representative does not dispute that the worker suffered a low back disability from November 12 to November 28, 1983. The employer, however, contests this claim on the grounds that the worker was performing a job within her medical restrictions and for this reason compensation ought not to be allowed. In this regard, it would appear from the worker's description of the job that the work performed by her on the pilot project was within her medical restrictions.

To establish entitlement, there must be personal injury by accident arising out of and in the course of employment. An accident includes disablement arising out of and in the course of employment. In this case, the Panel is satisfied that the worker has described a job activity which placed additional strain on her back because of the arm motions involved in sewing heavier carpet material. We are also satisfied that the worker's description of the timing of the onset of pain is consistent with a disability arising out of her work on the pilot project. The unaccustomed strain arose out of a change in job function from a lighter tack-down job to the heavier carpet sewing job. This, in our view, constitutes disablement arising out of and in the course of employment. It may be that the worker's previous compensable back disability rendered her more susceptible to a re-injury of her back, and in this regard we note that the location of the back pain is in the identical spot to that experienced by the worker after her accident of June 7, 1982. What is clear to this Panel is that the worker's disability was caused by an accident in the form of a disablement which arose out of and in the course of her employment and was caused by the work she was performing on the pilot project.

Having reached this conclusion, it is unnecessary for us to consider whether the job was within the worker's medical restrictions. A medical restriction is a doctor's best estimate of the type of activity which the worker would normally be able to do without causing a disability. If the doctor's estimate is correct, the worker presumably could perform jobs within medical restrictions without suffering a disability. Thus, evidence that a worker is performing a job within her restrictions is often evidence in support of an argument that a disablement did not arise out of or in the course of employment. However, it does not necessarily conclusively decide the issue. If other evidence establishes that a worker did

indeed suffer a disability performing a job within her medical restrictions and that evidence is accepted by the Panel, the worker will not be disentitled to benefits solely because the job was within her restrictions. In this case, we are satisfied that the disablement as described by the worker did arise out of and in the course of her employment. We also agree that the job the worker was performing was within the medical restrictions imposed on her by her doctor. It would appear that the medical restrictions did not prevent the worker from performing a job which led to a disability.

In our view, the Claims Review Branch and the Appeals Adjudicator erred in denying entitlement on the grounds that work was within the worker's medical restrictions. They ought to have considered whether the worker was unable to work during the relevant period because of an accident arising out of and in the course of employment.

Having reached this conclusion, we must address the employer's request for relief under the Second Injury and Enhancement fund. A review of prior Board proceedings indicates that this issue has not been addressed by the Board. The employer representative advised us that it was unnecessary for the employer to make an application for relief under the Second Injury and Enhancement Fund in previous proceedings because the worker's claim had not been allowed and there was therefore no need need to seek relief. We were further advised by the employer representative that it was common practice at the Board's previous final appeal level to grant relief without the necessity of the employer making a separate application to the primary adjudication level of the Board. In this regard, the employer referred to a 1973 Board decision. The employer points out that this procedure would require further processing and would unnecessarily delay the employer's request for relief.

Section 86g(2) of the Workers' Compensation Act provides as follows:

"The Appeals Tribunal shall not hear, determine or dispose of an appeal from a decision, order or ruling of the Board unless the procedures established by the Board for consideration of issues respecting the matters mentioned in clauses (1)(b) or (c) have been exhausted, and the Board has made a final decision, order or ruling thereon."

In our view, however sympathetic we might be to the employer's concerns about additional processing and delay, we are of the view that the Board should have the opportunity of ruling on an employer request for S.I.E.F. relief. This, we note, is consistent with a similar determination of another Panel¹ of the Appeals Tribunal in response to an employer application for S.I.E.F. relief. We suggest that if the employer believes that it may have entitlement to S.I.E.F. relief, it should apply to the Workers' Compensation Board for a determination of this issue.

¹Pension Assessment Appeal - Interim Report, Dated March 27, 1986.

DECISION

The appeal is allowed. This Panel finds that the worker is entitled to temporary total benefits for the period November 14, 1983, to November 28, 1983.

DATED at Toronto, this 23rd day of June, 1986.

SIGNED: J. Thomas, N. McCombie, D. Jago.

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Workers' Compensation Appeals Tribunal

DECISION NO. 191

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: N. McCombie

Member: D. Jago



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

June 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 191

THE APPEALS PROCEDURE

The employer appeals the April 25, 1985, decision of Appeals Adjudicator W.A. Paavola which allowed, in part, a worker appeal by finding that there was continuing entitlement to temporary total benefits arising from a lateral cutaneous nerve disability.

The appeal was heard on April 18, 1986, in Windsor, by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, N. McCombie, a member of the Tribunal representative of workers, and D. Jago, a member of the Tribunal representative of employers.

The worker was present at the hearing and was represented by G. McLister, Solicitor. The employer, a cement contractor, was represented by H.B. Geddes, Solicitor. The Panel was assisted by E. Newman from the Tribunal Counsel Office.

The Case Description Materials were marked as an exhibit. Reference was made to the transcript from the Appeals Adjudicator hearing and the transcript was also marked as an exhibit. A letter dated March 4, 1984, from G. McLister to the Workers' Compensation Board, and a letter dated April 16, 1986, from E. Newman of the Appeals Tribunal to the Workers' Compensation Board were also marked as exhibits.

All of the evidence before the Appeals Tribunal was contained in the exhibits. Submissions were made by the worker and employer representatives.

THE ISSUE AND HOW IT ARISES

The worker injured his left thigh and back when he fell into a ditch on November 11, 1974. The initial diagnosis was severe hematoma. He was off work for approximately 2 weeks, during which time he received temporary total disability benefits. Although the worker was able to return to work, he continued to experience problems with his left thigh and by 1976 the thigh was beginning to swell and the development of a lump or mass of material under the skin occurred. Although the thigh was painful, the worker was able to continue with his employment.

The swelling continued to persist and by January, 1983, the problem was diagnosed as a possible lipoma of the left hip. At a pension review in June, 1983, further investigations were recommended and the Board authorized a surgical biopsy to confirm the lipoma diagnosis. The worker was admitted to hospital on November 8, 1983. The next day, however, for reasons unknown to the Panel, the relatively simple biopsy procedure was not performed. Rather, the lipomatous mass in his left thigh was excised.

Ultimately, the worker was granted entitlement to temporary total benefits from November 8 to November 14, 1983, to cover the surgical procedure and post-operative recovery.

After the surgery, the worker continued to experience left thigh problems. The pain intensified and covered a larger area of his left thigh and leg. The problem was diagnosed to be damage to the lateral cutaneous nerve and there was some indication that the nerve damage was in some way related to the Board-authorized surgery.

The Claims Review Branch concluded that the lipoma was not related to the 1974 accident. It therefore confirmed entitlement only for the surgical operation to confirm a non-compensable condition.

The Appeals Adjudicator agreed with the Claims Review Branch that the lipoma was not related to the November 11, 1974, accident. However, the Appeals Adjudicator went on to consider the disability arising from the cutaneous nerve problem and concluded that the nerve condition was a sequel to the industrial accident of November 11, 1974. As a result, the Appeals Adjudicator allowed the payment of temporary total benefits subsequent to November 14, 1983, until the worker returned to work in May, 1984.

The employer appeals the decision of the Appeals Adjudicator as it relates to the cutaneous nerve problem. The employer asks the Tribunal to find that the cutaneous nerve problem is not related to the 1974 accident. There is, however, no dispute that the worker suffers a cutaneous nerve disability. It is the employer's submission that the cutaneous nerve problem is a result of Board-authorized surgical treatment and that, pursuant to the Board's policy on relief for surgical treatment, the cost of benefits should be charged to the Administration Fund of the Board and not directly against the employer.

The worker representative asks us to find on the evidence that the cutaneous nerve problem either was a result of the 1974 accident or was caused or exacerbated by the 1983 surgery. The worker has not cross appealed with respect to the finding of the Appeals Adjudicator that the lipoma is not related to the 1974 accident.

Thus, the issue before this Panel is whether the worker's nerve disability was caused by the 1974 industrial accident, or was caused by the 1983 surgery, or was caused by the 1974 accident and exacerbated by the 1983 surgery. If it is concluded that the 1983 surgery caused or exacerbated the nerve condition a further issue is the extent to which the employer, if at all, should be responsible for the costs of the claim.

THE PANEL'S REASONING

There is no doubt that the worker suffers a disability in his left thigh and the medical evidence substantially points to lateral cutaneous nerve damage as the probable cause of the worker's disability.

The employer representative reviewed the evidence in support of the employer's position that the cutaneous nerve problem arose after surgery. Mr. Geddes provided the Panel with a number of references to statements in the transcript of the Appeals Adjudicator hearing and reports contained in the Case Description which, in Mr. Geddes submission, indicate that the worker's pre-surgery complaints were restricted to swelling and pain in the lateral aspect of the left thigh. After the surgery, however, the complaints were directed towards a portion of the worker's body from just above the lateral knee joint to just below the anterior superior

spine. Moreover, the worker began complaining of numbness on the left side and pain in the left groin area after surgery and, in general, the pain was worse after the operation than before.

It was Mr. Geddes' submission that the Appeals Adjudicator relied heavily on the reports of Dr. Berkeley in concluding a relationship between the cutaneous nerve problem and the worker's 1974 accident. In particular, on January 9, 1984, Dr. Berkeley wrote a letter to the Workers' Compensation Board and enclosed a medical report which he had forwarded to Dr. Laing. The letter states:

"I am enclosing my note of January 9, 1984.

You will note that the question is whether or not there was some injury to the lateral cutaneous nerve at the left hip in the period following his accident of November 11, 1974.

I would be glad if you would call me on this."

In the enclosed report, also dated January 9, 1984, Dr. Berkeley provides the following summary and recommendation.

"Summary: This patient has had a large lipoma removed and the surgical scar is sensitive and is somewhat adherent to underlying soft tissues. Additionally there is numbness in a distribution similar to the lateral cutaneous nerve and quite marked sensitivity on pressure over this nerve's emergence.

Recommendation: (1) As discussed with you, I shall talk to WCB medical department as to whether or not his early findings included findings of injury to this nerve. If this were the case, then he has two conditions."

On December 6, 1984, Dr. Berkeley wrote to Dr. Grossman with a copy to Dr. Laing:

"This will confirm our telephone conversation of December 6, 1984, and I am writing as you requested re the above mentioned. You have indicated from the file at the WCB that Dr. J. Barber, in consultation on December 17, 1975, noted a swelling in the region of the outer aspect of the left hip, which would mean that he had had a persistent swelling for at least 13 months after his accident.

When we discussed the WCB chart further, and then looked at his findings in January, 1984, while it is difficult to be definite in a problem of this type, my general impression would be that he has had two conditions - (1) involvement of the cutaneous supply to the lateral cutaneous nerve of the left thigh, possibly associated with the hematoma in this general area and (2) he has had a lipoma of the left thigh which is not related to his compensable problem nor to his present symptoms."

It was Mr. Geddes submission that the Appeals Adjudicator ought not to have given much weight to the opinions of Dr. Berkeley. According to Mr. Geddes, the first report of Dr. Berkeley simply speculates on whether the nerve problem is related to the November 11, 1974, accident. The December report was not the result of an examination of the worker but was simply the confirmation of a consultation between Dr. Berkeley and other doctors. According to Mr. Geddes, the Berkeley reports, when read together, fall far short of associating the nerve problem with the accident of 1974. Of much more importance, according to the employer representative, are the differences in the post-surgery worker complaints compared to the pre-surgery ones, and the absence of specific findings about a nerve problem before surgery compared to the diagnosis of a cutaneous nerve problem after surgery.

Moreover, according to Mr. Geddes, since the Board has made a finding of fact that the lipoma condition is not related to the 1974 accident, then the Board-authorized surgery is also not related to the 1974 accident and the resulting nerve problem arises from a specific Board-authorized treatment for which the employer should not be responsible.

On behalf of the worker, Mr. McLister reviewed the portions of the transcript and the Case Description Materials which, in Mr. McLister's submission, demonstrate that the worker was experiencing nerve problems after the accident and before surgery. Mr. McLister made reference to the first report of the accident on November 12, 1974, which indicated "bruising of posterior and possible nerve involvement. Numbness in both legs." This description of the injury is repeated in an employer re-opening report to the Workers' Compensation Board dated December 4, 1975. The report of Dr. Dwyer on April 26, 1977, describes complaints of pain in the worker's left flank and indicates on examination "there are no sensory changes, except some dullness on the lateral side of the left thigh". Mr. McLister made reference to the constant complaints of pain throughout the period from 1974 to the present. It was Mr. McLister's submission that the worker's complaints after surgery were not different than before surgery except for the fact that the worker was complaining of more pain over a larger area of the worker's left thigh and flank. The removal of the lipoma did not reduce the worker's problems. Therefore, according to Mr. McLister, it would be reasonable to conclude that the nerve problem was the cause of the worker's pain from 1974 onwards and at most, the surgery may have further damaged the cutaneous nerve, thereby increasing the pain experienced by the worker after the surgery. Mr. McLister asks the Panel to consider carefully Dr. Berkeley's reports in reaching a conclusion that the worker's nerve problem is related to his 1974 accident and may have been exacerbated by the surgery.

A careful review of all of the medical reports in the Case Description Materials leads this Panel to conclude that there was evidence of nerve damage arising out of the 1974 accident. The first reports to the Board describe possible nerve damage and numbness which, more likely than not, can be attributed to damage to the nerves arising out of the worker's fall into the ditch. Dr. Dwyer's report of 1977 confirms a dullness in the left thigh and also describes complaints about pain in the left flank. This would indicate that as far back as 1977 the worker was complaining about discomfort over a fairly large area of his left leg.

Moreover, the report of Dr. Laing of October 26, 1983, describes the worker's complaints just before the surgical excision:

"He still complains of pain that radiated up to his hip and down toward his knee in the lateral aspect. He has not had any suggestion of circulatory or neurological problems otherwise to his leg. The exception to this is that he gets some pins and needles on occasion down the lateral aspect of the leg."

Dr. Laing's description of the worker's complaints before surgery involves an area of the worker's left leg that is very similar to the area of complaint after surgery and again confirms the presence of sensory problems before surgery. In his report of January 18, 1982, Dr. Laing describes the presence of "pins and needles in the left thigh area" and notes that the worker describes pain "that radiates approximately up toward the left hip, toward the iliac crest. This is becoming more severe and more incapacitating."

In our view, the reports of Dr. Berkeley, on their own, would not necessarily establish a relationship between the nerve problem and the 1974 accident. However, the continuity of complaint about pain in the left thigh and specific references in post-accident medical reports to sensory changes which were consistent with cutaneous nerve damage do indeed establish that the 1974 accident caused a cutaneous nerve problem. Dr. Berkeley's opinions corroborate a consistent pattern of complaints.

Although the nerve problem was not specifically diagnosed as damage to the lateral cutaneous nerve until after the operation, it would appear that before the surgery, medical attention was focussed on the worker's back and lump or swelling on his left thigh. Indeed, there is some indication in the file that the lump was thought to be a possible explanation for the worker's pain. In retrospect, this would appear not to have been the reason for the worker's pain but we are of the opinion that the focussing of medical attention on other, more apparently pressing medical problems, explains why the doctors did not diagnose a nerve problem before surgery.

As to the relationship between the worker's present nerve problems and his 1983 surgery, it is unfortunate that none of the medical reports specifically describe the medical relationship between the 1983 operation and the cutaneous nerve problem. We have uncontradicted evidence that the pain was worse after surgery than before. There is the report of Dr. J. Danial dated July 25, 1984, which offers the opinion

"Depressed touch and pain on the outer side of the left thigh appears to be due to damage to the lateral cutaneous nerve of the thigh possibly secondary to his surgery here."

The reports of other doctors including Drs. Laing, and Ayers establish fairly conclusively that the worker's problem is one of damage to the lateral cutaneous nerve but do not specifically relate the nerve problem to surgery. Although the Panel would prefer to have had more evidence on this issue, we are satisfied on a balance of probabilities, and in particular in accepting an abundance of evidence in the file that indicates the worker's pain was worse after surgery than before, that the surgery played some role in the worker's current pain problems. Thus, we conclude that a portion of the worker's disability can be related to his 1983 surgery.

We therefore conclude that the disability suffered by the worker after the surgery in 1983 resulted both from the 1974 injury and the subsequent surgery. The injury from the work accident was a significant cause of the later disability. Hence the disability is compensable.

Having reached this conclusion, we must turn to the issue of whether the employer ought to be granted cost relief from the Board's Administration Fund. Although both the worker and employer representatives urged us to make a finding on this matter, we respectfully decline to do so. In reaching this decision we are mindful of Mr. McLister's letter to the Board of March 4, 1985, in which the possibility of a relationship between the worker's nerve problem and surgery was raised. We note that while the issue may have been before the Appeals Adjudicator, no finding in respect of this issue was made. We are not satisfied, therefore, that we have jurisdiction to decide the issue because no final decision, order, or ruling has been made by the Board in respect of this issue. Section 86g(2) of the Workers' Compensation Act.

Moreover, we believe it would be unwise for this Panel to circumvent the Board's expertise in applying its own policies on secondary physical complications of injury or treatment, and second accident arising out of treatment. Having concluded that a relationship exists between the worker's current complaints and his 1983 surgery, we leave to the Board the application of its policy with respect to the employer's request for cost relief.

DECISION

The appeal is allowed in part. This Panel concludes that the worker's present disability is the result of damage to the lateral cutaneous nerve. We find that the damage was originally caused by the 1974 industrial accident and was exacerbated by the 1983 surgery. We therefore find that all of the worker's present disability is compensable. However, because we have concluded that part of the present disability results from 1983 surgery, there exists for the employer the possibility of some cost relief, which issue we leave to the Board for adjudication and determination.

DATED at Toronto this 13th day of June, 1986.

SIGNED: J. Thomas, N. McCombie, D. Jago.

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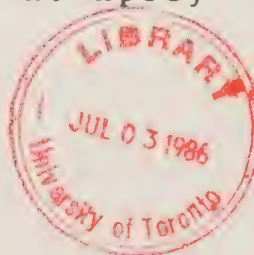
DECISION NO. 192

Tribunal d'appel des accidents du travail

Panel Chairman: A. Signoroni

Member: S. Fox

Member: R. Apsey



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

May 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 192

THE APPEAL PROCEDURE

The worker appeals the April 2, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, V.W. Ferguson. The Appeals Adjudicator decision reversed, in part only, the decision of the Claims Review Branch dated September 10, 1984.

The appeal was heard in Toronto on April 21, 1986, by a Panel of the Appeals Tribunal consisting of A. Signoroni, Panel Chairman, S. Fox, a member of the Tribunal representative of workers, and R. Apsey, a member of the Tribunal representative of employers.

The worker appeared without representation. The employer was represented by Sylvia Sly, the nurse at the plant where the worker was injured. The Tribunal was assisted by J. Marshall, a member of the Tribunal Counsel Office who appeared in the role of Tribunal counsel.

The Panel heard and considered evidence under oath by the worker and by Mrs. Sly, given in oral testimony. The Panel further read the relevant forms, memoranda, reports and medical reports extracted from the WCB files and collected in the Case Description Materials which were filed at the hearing, copies having been given to the parties in advance of the hearing. The Panel also read the Case Description recital of facts prepared by Tribunal counsel and agreed to by the parties. It received as well, at the hearing, two other medical reports presented by the worker. It heard submissions from the worker, Mrs. Sly, and Tribunal counsel.

THE ISSUE AND HOW IT ARISES

The appeal arises out of an incident at work on March 2, 1983. While attempting to position a reel of rubber hose, the worker got her dominant right hand caught between the lift bar and the reel. At the time there was marked swelling and an apparent dislocation of one of the joints of her thumb. Since that time she had marked pain related to carpal tunnel symptoms.

The incident took place minutes before the end of the shift. The next day she was given a different job which she did for approximately two weeks. After this period of two weeks, she was given office work. She continued to do this work until the last two weeks in July, 1983.

A doctor's first report dated June 24, 1983, diagnosed wrist contusion. Treatment included a nerve conduct study and physiotherapy. In July, 1983, she underwent surgery to correct a right carpal tunnel syndrome. The worker resumed working for the employer in November, 1983, doing light office work. She wore a wrist brace to support her right hand. In early December, 1983, she worked on a variety of jobs within the plant when office work was not available.

However, she was unable to continue to work at assigned tasks for any length of time due to the pain in her right hand. On December 9, 1983, she discontinued working under the advice of Dr. Rowlinson.

On June 18, 1984, at the request and pursuant to arrangements made by the WCB and the employer's nurse, Mrs. Sly, the employer endeavored to make available some light work. At the time, the only light work that was available was a paint job that she could perform with the left hand. The worker informed the employer's nurse that a prior knee problem in one leg and varicose veins in the other leg would make it difficult to do this work which involved stooping and squatting. Nevertheless she painted on that day for approximately eight hours with her left hand and had to stop due to constant and growing pain in her right hand. On June 19, 1984, the worker did not resume this painting job.

In November or December of 1984, the employer asked her to return for modified work which she was unable to do due to prospective surgery. On January 11, 1985, further surgery was performed on her right hand.

The worker claimed that she was totally disabled subsequent to June 19, 1984, and continuing. The Claims Adjudication Branch of the WCB terminated all benefits from June 18, 1984, stating "you are in fact able to do modified employment and there is no reason why you would be unable to perform the one-handed job which was offered by your employer and made available."

The decision to terminate benefits was upheld by the Appeals Adjudicator at a hearing on April 2, 1985, who stated that the worker could have continued with the work that was made available to her on June 18, 1984, had it not been for her unrelated problem with both legs. However, the Appeals Adjudicator granted her appeal, in part. Since the worker was referred for further medical investigation on October 2, 1984, it was found she was entitled to temporary total disability benefits under section 39 of the Act, then in force, from October 2, 1984, to the present time. These benefits are continuing.

The main issue for the Panel is, therefore, whether the worker was entitled to temporary total disability benefits for the period from June 19, 1984, to October 2, 1984.

THE PANEL'S REASONING

The decision to terminate benefits on June 19, 1984, was based on the judgment that the worker's right hand had recovered to the point that the work provided on June 18, 1984, was within her capacities except for her unrelated leg problems. Yet the work provided was painting with her left hand. This was done for eight hours after which the worker had to stop due to the constant pain in her right hand.

The medical evidence does not support the view that the worker could have continued working except for reasons of her unrelated leg problems.

In a letter to the WCB dated October 3, 1983, Dr. J. McCall, an orthopaedic surgeon, concluded by noting:

"In any event, the Board should realize that this woman has two problems, i.e. a crush injury to her median nerve and also subluxation of the CMC joint of the right thumb and at the present time it seems to me that the CMC joint is the more symptomatic of the two injured areas."

In a review note dated May 23, 1984, Dr. R.D. Miller noted:

"I don't foresee in the immediate future that she will be able to return to the (employer) plant as the type of work she is doing involves a lot of hand activity and her hands would not tolerate this as yet. In the meantime, I'm sure there must be some sort of appropriate work that this woman could do. From my point of view I have no plans for further treatment at this point."

Dr. J. McLeod noted in a letter dated May 30, 1984:

"Apparently the job she is to do at (employer) are either painting or working on the trim saw. Both of these jobs require repetitive use of her right wrist. Because of the nature of the work and her present symptoms, I do not think this lady is ready to return to her job."

Dr. Robert Y. McMurtry, an orthopaedic and hand surgeon, noted in a letter dated October 2, 1984:

"This very pleasant 28-year-old lady was injured in March of 1983 when her dominant right hand was crushed by a machine while at work. At that time, she had marked swelling about the base of her thumb. Apparently a safety officer at work reduced a dislocated joint at the base of the thumb. Subsequent evaluation at the hospital revealed no radiological (sic) abnormality and she was treated for a major soft tissue swelling. Over the ensuing few months, she developed symptoms of carpal tunnel syndrome and she underwent a carpal tunnel release which gave her relief of her symptoms of weeks and then they recurred as bad as they had been prior to surgery. Since that time, she has had disabling pain and swelling in the first web space of her hand and at the base of her thumb. Her symptoms are present 24 hours a day and are exacerbated by housework and appear to be fairly constant over the last few months."

We are of the view that the medical evidence before this Panel supports the conclusion that the condition of the worker's right hand was such that the work offered her on June 18, 1984, was beyond her abilities to perform, regardless of the knee problem and the varicose veins she was suffering at the time.

As was noted in the Appeals Adjudicator's decision, temporary total disability benefits were reinstated on October 2, 1984, because on that date she had been referred for further medical investigation.

A letter from Dr. F.A. Rawlinson dated April 18, 1986, was submitted to the Panel. It read:

"This is to confirm that I phoned, in June 1984, to make an appointment at Sunnybrook Hospital for this lady at the hand clinic. She was seen October 2, 1984."

The three months delay between June and October, 1984, occurred because it took that long for an open date to be found at the hospital. The "referral for further medical investigation" which the Appeals Adjudicator found as the basis for entitlement to temporary total disability from October 2, 1984, was actually made in June of 1984. The delay was occasioned by reasons beyond the control of the worker.

DECISION

The appeal is allowed. The worker is entitled to total disability for the period from June 19, 1984, to October 2, 1984. The Tribunal leaves to the WCB the calculation of the amounts in question without prejudice to the worker's right to further appeal should there be any dispute concerning that calculation.

DATED at Toronto, Ontario this 28th day of May, 1986.

SIGNED: A. Signoroni, S. Fox, R. Apsey.

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Workers' Compensation Appeals Tribunal

INTERIM DECISION NO. 196

Tribunal d'appel des accidents du travail

Panel Chairman: I. Strachan

Member: L. Heard

Member: D. Jago



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

June 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

INTERIM DECISION NO. 196

This is an appeal by the worker from the decision of the Workers' Compensation Board Appeals Adjudicator, M. Prpic, dated September 6, 1985, denying the worker's claim for benefits arising from certain fractures suffered by the worker on June 6, 1984, as a result of a fall from a ladder at the worker's home.

The appeal was heard in Sudbury on April 21, 1986, by a Panel consisting of I.J. Strachan, Panel Chairman, L. Heard, a Tribunal member representative of workers, and D. Jago, a Tribunal member representative of employers (the "Panel").

The worker attended and was represented by K. Lovely of The Office of the Worker Adviser in Sudbury. The employer was represented by S. Corrigan.

The issue before the Panel is essentially whether the fractures suffered on June 6, 1984, were a consequence of the industrial accident of November 3, 1980, which resulted in a back disability. If the accident on June 6, 1984, can be reasonably attributed to the injury sustained in the industrial accident of November 3, 1980, then the worker is entitled to benefits under the Act.

A preliminary issue arose with respect to the consumption of alcohol by the worker prior to the June 6, 1984, accident. According to the worker's representative, Mr. Lovely, the parties and Tribunal counsel had agreed that alcohol was not an issue in the appeal. Accordingly, in the event the Tribunal proposed to consider the issue of alcohol, Mr. Lovely requested an adjournment to produce as witnesses the neighbours whose statements appear in the Case Description and the worker's wife in order to provide further and better evidence with respect to the limited consumption of alcohol by the worker prior to the accident.

Since the Tribunal cannot automatically be bound by an agreement between the parties and since consumption of alcohol may be a significant factor in determining entitlement to benefits, the Tribunal granted the worker's request for an adjournment to enable the worker's representative to bring further and better evidence before the Tribunal.

DATED at Toronto this 9th day of June, 1986.

SIGNED: I.J. Strachan, L. Heard, D. Jago.

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Workers' Compensation Appeals Tribunal

DECISION NO. 198

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: S. Fox

Member: D. Grenville



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

June 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 198

THE APPEAL PROCEDURE

The worker appeals the August 28, 1984, decision of Workers' Compensation Board Appeals Adjudicator M.L. Crapper, which denied the worker entitlement for an upper back or cervical spine disability subsequent to January 21, 1983. The worker contends that his ongoing upper back or cervical spine injury results either from a compensable accident on June 30, 1978, or a compensable accident of October 20, 1982, or a combination of both.

The appeal was heard on April 22, 1986, by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, S. Fox, a member of the Tribunal representative of workers, and D. Grenville, a member of the Tribunal representative of employers.

The worker attended the hearing and was represented by J. Hallonen of the Thunder Bay Office of the Worker Adviser. J. Cockburn, Employee Relations Supervisor represented the employer. Z. Onen from the Tribunal Counsel Office attended at the commencement of the hearing to assist in defining the issues.

The Panel had the benefit of Case Description Materials which were marked as an exhibit. Other materials from the Board file and relevant WCB policies were entered as exhibits at the commencement of the hearing. The worker testified under oath and submissions were made by the worker and employer representatives.

THE ISSUE AND HOW IT ARISES

The worker injured his lower back on June 30, 1978. While carrying a roll of paper with both hands he slipped and fell, wrenching his back. The fall caused a severe low back disability. Surgery on his lower back was performed in June, 1979, and he was unable to return to work until June, 1980. Apart from a two month absence from work for a non-compensable problem and a month off work for an intensive muscle therapy program, the worker was able to continue with his regular employment until October 20, 1982. On that date, he passed out on the job due to severe neck, arm and upper back pain. Once more, he was off work, this time for an upper back and neck problem, until June, 1983, when he was able to return to modified employment. Because of continuing problems with his neck, he was forced to lay off work in February, 1984, at which time a cervical fusion was performed. The worker remained off work for approximately another year, returning to work in early 1985. He has been able to remain at his employment since that time.

The worker's lower back problem was recognized by the Worker's Compensation Board and entitlement was granted. He is now in receipt of a permanent pension for that condition.

The Board also accepted that the October 20, 1982, incident constituted disablement arising out of and in the course of employment and he was granted entitlement on an aggravation basis for his upper back and neck problem. The Appeals Adjudicator confirmed the Claims Review Branch decision that the worker had

a pre-existing upper back and neck problem which was not related to his employment. The Appeals Adjudicator further confirmed that by January 21, 1983, the worker's upper back and neck problems had returned to the condition they had been in prior to the 1982 accident. Accordingly, benefits were terminated as of January 21, 1983. No further entitlement has been granted for the worker's upper back and neck condition.

It is the worker's contention that his upper back and neck problems continued to persist after January 21, 1983, and prevented him from returning to his regular employment. The worker feels that his upper back and neck problems arose out of the 1978 accident. It is the worker's position that if he had a pre-existing neck condition before the 1978 accident, it was asymptomatic until after the 1978 accident. Therefore, the neck problem which existed before the October 20, 1982, accident resulted from the 1978 accident. It is the worker's further position that if this Panel were to conclude that the worker's neck problems prior to the October 20, 1982, incident arose out of a non-compensable pre-existing condition, the October 20, 1982, incident aggravated his pre-existing condition and by January 21, 1983, the neck condition had not returned to the pre-October 20, 1982, state. Accepting either of the two positions, according to the worker's representative, would result in a finding of a compensable neck condition after January 21, 1983.

The employer does not contest the worker's entitlement to compensation for his neck condition from October 20, 1982 to January 21, 1983. The employer, however, takes the position that there was an absence of complaints or medical treatment for the worker's neck condition between 1978 and a period of time just prior to October, 1982, and therefore the neck condition cannot be related to the 1978 accident. Moreover, according to the employer, the October 20, 1982, incident was minor in nature and the worker had indeed recovered to his pre-accident condition by January 21, 1983.

One issue, then, before this Panel is whether the worker's upper back and neck problem prior to the October 20, 1982, incident arose out of the 1978 accident. If not, another issue is whether the worker's neck and upper back problems after January 21, 1983, had returned to their pre-October 20, 1982, level of disability.

THE PANEL'S REASONING

This panel has no hesitation in accepting the oral testimony of the worker. His testimony was given in a straightforward and honest way. In response to questioning by the employer representative, the worker readily admitted that there was no record of upper back complaints in the company's first aid files between June, 1980 and October, 1982. He agreed that he had never left work because of his upper back problem. He said that he was indeed surprised that none of the medical reports in the relevant period of time referred to his upper neck problem but he suggested that most of the doctors' attention between 1978 and 1982 was focused on the worker's lower back and he was told by his doctors that his upper back pain was probably related to his lower back problem. The one significant inconsistency in the worker's testimony involved the worker's description of the events of October 20, 1982. He provided the Panel with a detailed description of an incident in which he sharply turned his neck in response to a tap on his shoulder. He told the Panel that he was about to turn to the right when he felt a tapping on his left shoulder. He did not know if the tapping was from a co-worker or from the end of a

paper break. It startled him and he jerked his head to the left. He recalled some pain going up the left side of his back into his shoulder and then he lost consciousness. The employer representative referred the worker to the notes of the Workers' Compensation Board investigator, dated September 7, 1983. The notes describe a discussion between the investigator and the worker in which the worker states that the last thing he can recall is straightening up to turn to the right to grab another section of paper. The next thing he recalls is waking up in the hospital.

Although the worker was puzzled by the inconsistency, he indicated that he might have been telling the investigator what his actual recollection was of the incident. He explained to the Panel that originally he could not recall what he had been doing just before he lost consciousness. Subsequently, his co-workers told him what had happened and had explained the tapping incident to him. The Panel accepts the worker's explanation. As importantly, the way in which the worker dealt with the inconsistency satisfies this Panel that the worker's evidence is to be believed.

We think it is important to make these observations about the worker's evidence because on the issues of continuity of complaint and degree of seriousness of the October, 1982, incident, there is not a great deal of corroborating evidence.

The worker told the Panel that when he was injured on June 30, 1978, the pain was in his lower back. He was placed in traction for several weeks and while he was in traction the pain went up the left side of his back into his shoulder-blade. He indicated that he did mention the upper back pain to his family doctor, Dr. Moulton, but was advised by Dr. Moulton that the upper back pain was a "relay condition" and was related to his lower back problem. He indicated that after his lower back surgery in June, 1979, the pain in his lower back was relieved but he still had pain in the left side of his back and up into the left shoulder. He told the Panel that he complained about the upper back pain to Dr. Hoffman, the orthopaedic surgeon who performed the lower back operation but Dr. Hoffman indicated that the upper back pain was probably related to the lower back condition, and would eventually disappear.

During his admission to Downsview Vocational and Rehabilitation Centre in late May and early June, 1980, his lower back condition was tested. He did not talk about his upper back condition because he had been told by Dr. Hoffman that the problem would go away. Upon his discharge from Downsview, certain lifting restrictions were placed on his job but the worker testified that when he returned to work in June, 1980, he went back to his regular job which involved lifting substantially more weight than the medical restriction imposed by Downsview. He told the Panel that when he started back to work his low back was quite sore and tender but eventually the pain subsided. The pain in his upper back was still there. He recalls complaining to his supervisor but cannot recall if he reported it to the company nurse. He also told a few co-workers about his upper back pain.

During an examination by Dr. Hoffman in July, 1981, Dr. Hoffman noted a deteriorating muscle condition and the worker was admitted to Westmount Hospital for intensive muscle therapy. He indicates that he complained to the head therapist about his upper back pain. He returned to work after his intensive therapy with bending or stooping restrictions imposed by Dr. Hoffman. Again, he returned to his regular job which exceeded the medical restrictions. He continued to work at his regular job until the incident of October 20, 1982. As previously

indicated, this Panel accepts the worker's evidence that the incident of October 20, 1982, involved a sharp turning of his neck. Reports for a few months prior to October 20, 1982, confirm complaints about neck problems.

A review of the Appeals Adjudicator decision indicates that the worker gave substantially the same evidence about continuity of complaint at the Appeals Adjudicator hearing. However, the Appeals Adjudicator noted a report of Dr. Moulton, dated October 29, 1982, in which the doctor formed the opinion that the neck problem is not compensable and further noted the absence of recorded complaint until October 20, 1981. On this evidence, the Appeals Adjudicator concluded that the worker's upper back problems were not related to the 1978 accident.

This Panel has had the benefit of additional evidence which was not before the Appeals Adjudicator when his decision was made. In particular, a report of Dr. Moulton dated October 18, 1984, establishes worker complaints about neck pain between July and September, 1978. Dr. Moulton's report contains the following references to neck complaints:

"(The worker's) first accident affecting his back was in fact on June 30, 1978, and I enclose a copy of the La Verendrye General Hospital admission. As you will see there is no record at that time of any problem related to his neck. However, there is no doubt about the disc lesion causing his left sided sciatica and as you will see from the attached photostat, it was reported to the WCB at that time.

After his discharge from hospital at that time he was seen in the Clinic on the 19th of July, 1978. My record reads "back still very sore. Straight leg raising 30 degrees on the left. Now also cervical spondylosis". He was given advice about the neck and advised to rest further. This was the first comment that I had made about his neck and I could not be sure to what it was related. However, it was only some 20 days from the time of his accident.

He was then seen on the 26th of July, 1978, complaining of low back pain which did move up into his neck, with some sharp headaches over the top of his head. This had been bothering him almost all of the time for a week. He was having tingling down the back of his left leg, which was increased on exercise.

On examination: there was a marked reduction in neck movement and he was tender along the cervical and lumbar spine. Movements of the spine were markedly reduced, however, straight leg raising had increased to 40 degrees on the left.

He was then seen on the 8th of August, 1978, slowly getting better. He still had left sided sciatica. His analgesics were changed. He was still complaining of numbness and paresthesia in his toes, and his neck was still sore."

Dr. Moulton goes on to indicate that in August, September, and October, 1978, his neck problem improved.

Dr. Hoffman, in his report of September 23, 1984, confirms the worker's complaint about neck discomfort while admitted to Westmount Hospital in the fall of 1981.

In our view, the worker's description of his 1978 neck complaints is consistent with the report of Dr. Moulton, dated October 18, 1984, which report was not available to the Appeals Adjudicator when his decision was rendered. In accepting the worker's evidence that he experienced no upper back or neck complaints prior to his accident of June 30, 1978, we conclude that the worker may well have had an asymptomatic pre-existing condition prior to June 30, 1978, in the form of cervical spondylosis, but that the accident of June 30, 1978, substantially aggravated the pre-existing condition and rendered the condition symptomatic. The worker has established continuity of complaint between the accident of June 30, 1978, and his neck complaints just prior to the October 20, 1982, incident. Moreover, the accident of June 30, 1978, was a serious one and in our view could well account for a symptomatic upper back condition. We therefore conclude that the worker's neck condition before the October 20, 1982 accident had not returned to the condition it would have been in but for the 1978 accident.

As to the effect of the October 20, 1982, incident on the worker's subsequent neck problems, we note that the worker was examined by Dr. Hoffman September 13, 1982, a month before the October incident, at which time he complained of left arm and neck discomfort. Dr. Hoffman diagnosed the worker's problem as "thoracic outlet syndrome". The worker testified that after the October 20, 1982, incident he was fitted with a cervical collar which he wore for several months. He was again seen by Dr. Hoffman on December 20, 1982, and was diagnosed as having "cervical disc lesion with nerve root impingement". In Dr. Hoffman's letter to the worker's previous solicitor, dated October 17, 1984, Dr. Hoffman formed the opinion that the worker's neck injury was a result of the accident of October, 1982. He states:

"The symptoms of which he was complaining prior to that (October, 1982) could not really, I think, be in all honesty related to his work situation. The sudden twisting movement that he made, however, in October of 1982, could indeed be associated with a serious cervical disc injury and really it was that incident that initiated the problems he was having with his neck."

When Dr. Hoffman made this assessment on October 17, 1984, he had not received Dr. Moulton's letter of October 18, 1984, in which Dr. Moulton describes the worker's neck complaints dating back to 1978. After receiving Dr. Moulton's letter, Dr. Hoffman responded in a letter dated November 9, 1984, as follows:

"It is indeed certainly conceivable that there could be a period of remission between the actual injury of a cervical disc and the stage at which it becomes seriously enough symptomatic to be reported as a serious disability. Furthermore, it is to be noted that each time the patient saw me, his attention and mine were being entirely focused on his lower back problem and if the neck symptoms were mildly present, but not enough to lead him to complain about them, they could have passed unnoticed by me."

Therefore, with respect to Dr. Hoffman's comments of October 17, 1984, we believe the failure to relate the worker's neck injury to the 1978 accident resulted, in part, from Dr. Hoffman's lack of information about prior complaints to Dr. Moulton. His October 17, 1984, report does, however, indicate that the cervical disc lesion which was diagnosed after the October incident could well be related to the October, 1982, incident, particularly where there exists a pre-existing condition.

This Panel is therefore satisfied that the worker's upper back and neck problems after October, 1982, arose from the worker's industrial accidents of June 30, 1978 and October 20, 1982.

With respect to the worker's entitlement to benefits from January 21 to June 6, 1983, the evidence establishes that the worker was temporarily partially disabled because of his upper back and neck problems during this period of time. Although he was able to return to modified employment as of January 21, 1983, Dr. Hoffman imposed medical restrictions with respect to the worker's neck condition. The employer admits that it would not accept these medical restrictions and would not return the worker to his pre-accident employment. In light of the worker's problems in October, 1982, this was not an unreasonable position for the employer to take. The employer did not have other modified work for the worker. We are satisfied that under these circumstances, a worker cannot be considered to be unavailable for work which is suitable and available, which is one of the grounds for disqualifying a worker from receiving full benefits for a temporary partial disability under section 41(1)(b) of the Act.¹ The evidence establishes that there was no work available at the accident employer, which was suitable in light of the worker's medical restrictions. We are also satisfied that the worker was available for modified employment within his medical restrictions. The worker had established a history of employment with the accident employer and stayed in contact with the accident employer in the hope that modified employment would become available. Given the worker's previous success in returning to work with his accident employer, and recognizing that the worker was employed in a somewhat remote location, we think it is reasonable that the worker continued to concentrate on re-employment with the accident employer as opposed to actively seeking other employment. As it turned out, the worker's decision to stay in contact with the accident employer proved successful and he was rehired when modified work became available. In these circumstances, we conclude that the worker was not unavailable for suitable and available work between January 21, and June 6, 1983, and therefore is entitled to temporary total benefits under the provisions of section 41(1)(b) of the Act.

The worker is also claiming entitlement to Workers' Compensation benefits for his cervical disc fusion operation in February, 1984, and the subsequent recovery period, which, we understand, covered a span of about one year. Workers' Compensation Board memos clearly establish ongoing continuity of upper back and neck complaint during the period June, 1983, to early 1984, during which time the worker was able to return to modified employment. The cervical disc fusion

¹All section references are to the section numbers as they existed prior to April 1, 1985.

operation was performed to correct the cervical disc lesion which resulted from the worker's compensable accidents of June, 1978, and October, 1982. We therefore conclude that the treatment and subsequent recovery period resulted from injuries which were caused by accidents arising out of and in the course of the worker's employment. The worker is therefore entitled to Workers' Compensation benefits for the surgical treatment and subsequent recovery period.

DECISION

The appeal is allowed. We find that the worker is entitled to full benefits under Section 41(1)(b) of the Act for the period January 21, 1983, to June 6, 1983. The worker has also established entitlement to benefits for the cervical disc lesion operation and subsequent recovery period. We leave to the Board the determination of the amount and extent of such benefits.

DATED at Toronto this 13th day of June, 1986.

SIGNED: J. Thomas, D. Grenville, S. Fox.

CASPHN

L 95

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Workers' Compensation Appeals Tribunal

DECISION NO. 201

Tribunal d'appel des accidents du travail

Panel Chairman: L. Bradbury

Member: S. Fox

Member: K. Preston



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

June 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 201

THE APPEAL PROCEDURE

The worker requests leave to appeal the Workers' Compensation Decision of the Board dated February 27, 1969. That decision was reconsidered by the WCB Appeal Board at the worker's request on October 12, 1976, on July 28, 1980, and again on September 23, 1981. The Board denied the requests for reconsideration on the basis that there was no new evidence which would cause it to vary, amend, or revoke its 1969 decision.

On April 25, 1986, the matter came before a Panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, S. Fox, a member of the Tribunal representative of workers, and K. Preston, a member of the Tribunal representative of employers. The employer was represented by D. Brady from the law firm of Hicks, Morley, Hamilton, Stewart & Storie. The worker appeared and chose to represent himself. E. Newman appeared on behalf of the Tribunal's Counsel Office.

The Panel and the parties had before them materials prepared by the Tribunal's Counsel Office on two preliminary procedural matters. These materials were marked as Exhibit #1. Mr. Brady, the worker and Mrs. Newman made submissions on the procedural matters.

THE ISSUE AND HOW IT ARISES

The worker claims that he suffered industrial accidents on December 6, 1962, and on August 2, 1963, while working for the employer and, as a result, suffered ongoing disabilities. The 1969 Decision of the Board denied the worker entitlement to compensation for both those accidents.

As noted above, the worker made three requests to the Appeal Board to reconsider the 1969 decision. All three requests were denied. The worker has now applied to this Tribunal for leave to appeal the 1969 Decision of the Board in accordance with section 860 of the Workers' Compensation Act, 1985. That section states in subsection 2:

"With the leave of the Appeals Tribunal, a decision of a panel of the Board made before this section comes into force may be appealed to the Appeals Tribunal."

The employer then applied to this Appeals Tribunal for access to the documents in the worker's file so that it could prepare for a hearing on the leave issue. Mr. Brady advised the Panel that the employer does not have copies of any documents related to the worker's claim from the earlier appeals.

The worker notified the Appeals Tribunal, in writing and at the hearing, that he objected to the employer receiving copies of any documents in his WCB file. The basis of his objection is that the documents are personal and he is not prepared to have them released to the employer. In addition, the worker alleged that the employer treated him very unfairly in the past and he appeared concerned that, if documents are released to the employer, the employer will have an opportunity for further unfair treatment.

The first procedural question for this Panel is therefore what kind of access, if any, should the employer be granted.

Once a decision is made on the access issue, the second question for the Panel is what procedure should be followed by the Tribunal on the leave application. Specifically, the question is whether the Panel should adopt a two step process which separates a hearing on the leave application from a hearing on the merits of the case; or should the Tribunal hear the leave application and the merits of the case at the same time.

THE PANEL'S REASONING

We propose to deal with the procedural issues individually.

A. Access

Practice Note No. 1, dated February 12, 1986, written by S.R. Ellis, Chairman of the Workers' Compensation Appeals Tribunal, addresses the issue of access to workers' files. It notes that section 77 of the Workers' Compensation Act sets out specific procedures for the WCB to follow when requests for workers' files are made to the Board; however, the Act does not set out any procedures when such requests are made to the Tribunal. In the case before us, the matter came directly to the Tribunal, as a leave application, and the access question is thus raised here, rather than at the WCB.

Since the Board's procedure under section 77 has not been applied, the first question is whether this Panel can determine what access to documents on file should be given to the employer. It could be argued that the access request must be returned to the Board and decided there in accordance with its procedure in section 77. Practice Note No. 1, however, canvasses this possibility and concludes that such a procedure would create delay and serious procedural problems. The Note goes on to state that the Tribunal is required by section 86k of the Act to determine its own practice and procedure and that the Tribunal must therefore develop the appropriate access procedure in cases like this. In addition, Mr. Brady argued that section 86j of the Act gives the Tribunal jurisdiction to determine access in this case. That section states:

s.86j(1) Upon receipt of a notice of appeal, the Appeals Tribunal shall, as soon as practicable, notify the Board and the parties of record of the appeal and the issue or issues in respect of which the appeal is brought and shall furnish the same with copies of any written submissions made with respect thereto.

s.86j(3) Upon receipt of a notice under subsection (1), the Board shall forthwith transmit the Board's records related to the appeal to the chairman of the Appeals Tribunal.

In this case, there is an application for leave to appeal by the worker and the WCB has forwarded its records to the Tribunal, thus meeting the requirements of section 86j.

This Panel is satisfied that it must determine the question of access to the documents which become available for the purposes of Tribunal proceedings. First, a leave to appeal application, though not an appeal in the ordinary sense, is part of the appeal process and as such comes within section 86j. That section, while referring literally only to a notice of appeal must be intended, given the context, to encompass notices of applications which are made directly to the Tribunal such as applications under section 15, section 21 and leave applications. The practical requirement of notice to the Board and to the parties and the Tribunal's need to have the Board's record transmitted applies equally to "applications" as it does to "appeals". Second, the Panel agrees with the reasoning in Practice Note No. 1 and finds that the Tribunal is not bound by section 77 of the Act, but can determine its own practice in the circumstances of this case.

Having found that we can determine access, the Panel must then consider what access to documents should be given. Practice Note No. 1 sets out the competing interests in access cases. These are, on the one hand, the right of the worker to have the information in his or her file kept confidential and, on the other hand, the right of the employer to disclosure under the rules of natural justice and procedural fairness. The employer can make effective representations only if it has the essentials of the evidence on the issues to be considered by the Hearing Panel. The Practice Note goes on to conclude that, in balancing these interests, the employer's right to access should in any case be limited to receiving only those documents which are relevant to the issue under appeal.

The employer's representative agreed that the criterion of relevance is an important safeguard in granting access. The Panel accepts relevance as the main criterion in granting access to an employer participating in an appeal respecting worker benefits. Determining which documents are relevant, however, is not an easy task, particularly in a case such as this where the worker objects to any documents being provided to the employer.

Apart from looking at the simple meaning of "relevant" as anything tending to prove or disprove the matter at hand, any determination of relevance must deal with various categories of documents. Documents which are relevant and not of a prejudicial or embarrassing nature will constitute the main category and will be disclosed as a matter of course to the employer. The two categories which present difficulties are:

1. There may be material which is relevant but which is of minimal weight and the disclosure of which may represent a very serious invasion of the worker's privacy. Where the adverse consequences to the worker of disclosure of such material far outweighs the significance of the material to the appeal, this material should not be disclosed.
2. There may be material the disclosure of which may represent a serious invasion of the worker's privacy but it may be relevant and of such obvious weight that there could not be a fair hearing without disclosure of this material. In the Panel's view, this is material which would have to be disclosed if the proceedings are to continue.

The procedure for categorizing the documents and arriving at the decisions will be as follows:

1. The Panel, with the assistance of the Tribunal's counsel, but without the participation of the parties, will review the file documents to categorize them and will then decide which documents should be disclosed to the employer. Documents which are not disclosed will not be referred to in the hearing and determination of the substantive issues.
2. Once the decision is made, a list of those documents will be sent to the worker by registered mail.
3. Since the Panel in this case has already heard and considered the worker's objections on disclosure, the worker will only be asked to indicate if there are documents he considers relevant to his application which are not on the list. If he indicates a wish to rely on additional documents, the Panel will then consider whether those must be disclosed to the employer.
4. The worker will also be told that the selected documents will not be forwarded to the employer unless the Tribunal is advised that the worker wishes to proceed with his application now that he knows which documents will be disclosed to the employer. The worker will be asked to advise the Tribunal's Counsel Office of his intention to proceed with the appeal or to withdraw his application.
5. If the worker decides to proceed with his appeal, the leave application will proceed before a different Panel of the Tribunal. This is consistent with the Tribunal's practice of ensuring that the Hearing Panel which decides the case sees and considers only the material which is available to both parties.
6. If the worker proceeds with his leave application, the relevant documents will be forwarded to the employer on receipt of an undertaking from the employer not to use any personal or medical information from the file other than for purposes of the appeal.

B. Leave

The employer's representative argued that there should be a two step process in leave applications. That is, a Panel of the Tribunal should first hear and decide the leave issue. If leave is granted, a different Panel should then hear the case on its merits. Mr. Brady argued that the language of the Act requires a two step process and that the Panel might be exceeding its jurisdiction if it heard the leave application and the merits of the case together.

The Act provides that "With the leave of the Appeals Tribunal ..." a decision of a Panel of the Appeal Board can be appealed to the Tribunal. The Act goes on to provide that leave shall not be granted unless:

- s.86o(3)(a) there is substantial new evidence which was
unavailable at the time of the hearing by the Panel;
or
- (b) there appears to the Appeals Tribunal to be good
reason to doubt the correctness of the decision.

In this case, it is unclear to the Panel which ground the worker is relying on in his leave application. However, it is clear to us that the criteria for granting leave under one of the two grounds set out above are different than the criteria applied in granting an appeal. The Workers' Compensation Act provides a different test for the Tribunal in deciding regular appeals. That test is set out in section 3(4) which states:

"In determining any claim under this Act, the decision shall be made in accordance with the real merits and justice of the case..."

The wording of section 3(4) is very broad, whereas section 86o sets out very specific criteria for permitting an application for leave to appeal. In deciding leave applications, the specific criteria in section 86o(3) itself will guide the Tribunal. The different tests set out in the Act argue in favour of a two step process.

In addition, counsel for the Tribunal submitted that, if both the leave and merits are heard together, there may be a temptation to be influenced by the merits of the case in deciding the leave application. There are a number of court decisions in Ontario which conclude that that approach is wrong. The Tribunal's counsel quoted Mr. Justice Reid of the Ontario Supreme Court in the Canadian Egg Marketing case who wrote:

"There is, to me, a difference between doubting the correctness of a decision and concluding that it is wrong. To require a Judge to whom an application for leave is made to decide whether the decision is right or wrong is to duplicate functions, for that is the job of the higher court if leave is given."

Mr. Justice Reid's comments are very similar to the words of section 86o(3)(b) quoted above.

There is another difference between leave applications and appeals on the merits and that is the question of onus. It appears from the wording of section 86o(3) that the party seeking leave to appeal has an onus to say why he/she is seeking leave and on what grounds. The entitling sections of the Act, however, do not place an onus on the claimant; rather, they set out certain pre-requisites that must be met before compensation is paid. There is no burden on a worker to prove his or her case. The claim is investigated, the evidence is weighed and a decision is made. Again, this difference suggests to the Panel that a two step process is required in leave applications.

There are also a number of practical reasons why there should be a two step process. Separate leave applications will, as a rule, focus on a more narrow issue than will be raised in the appeal itself and therefore the length of the hearing and the nature of the preparation required by the parties will be different.

¹ Canadian Egg Marketing Agency v. Sunnylea Foods Limited et al, (1977) 3 CPC 348, at page 350.

The Panel concludes that a two step process for applications for leave and hearings on the merits is the one that should be adopted by the Tribunal.

DECISION

1. The employer is to be granted access to that material in the worker's file which in this Panel's view is relevant to the worker's application for leave to appeal the 1969 Decision of the Board, subject to the exclusion of materials the embarrassing or prejudicial nature of which clearly outweighs its potential value as evidence.
2. Material held back from the employer on the latter ground will not be referred to by the Hearing Panel which decides the leave application.
3. The decision as to what material is to be disclosed is to be determined by this Panel, in consultation with the Tribunal's Counsel Office.
4. Once the worker has been advised of the material that is to be disclosed and indicates that he wants to proceed, the application for leave to appeal will be heard first, by a different Panel of the Tribunal. If leave is granted, then the actual appeal will be heard by a third Panel.

DATED at Toronto this 12th day of June, 1986.

SIGNED: L. Bradbury, S. Fox, K. Preston.

Workers' Compensation Appeals Tribunal

DECISION NO. 203

Tribunal d'appel des accidents du travail

Panel Chairman: A. Signoroni

Member: D. Beattie

Member: D. Mason



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

May 1986

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 203

THE APPEAL PROCEDURE

The worker appeals the decision of the Workers' Compensation Board Appeals Adjudicator, V.W. Ferguson, dated July 16, 1984, in which entitlement to compensation and medical benefits for low back disability requiring lost time was denied since it had not been found that the evidence showed that the worker suffered a compensable accident during the course of his employment on August 27, 1983.

The appeal was heard on April 23, 1986, by a Panel of the Appeals Tribunal consisting of A. Signoroni, Panel Chairman, D. Beattie, a member of the Tribunal representative of workers, and D. Mason, a member of the Tribunal representative of employers.

The worker appeared and was represented by O. Cardile, an assistant to B. Rae, M.P.P. The employer appeared and was represented by G.A. Storey, an employer's compensation adviser. The Panel was assisted by R. Nairn, a member of the Tribunal Counsel Office, who appeared in the role of Tribunal counsel. An interpreter in the Italian language was present to assist the worker.

The Panel heard and considered evidence given under oath by the worker and the employer in oral testimony. The Panel also read the Case Description recital of the facts prepared by the Tribunal counsel and agreed to by the worker's and employer's representatives. The Panel further read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description including the transcript of the Appeals Adjudicator hearing which was filed as Exhibit #1 at the hearing. The Panel received and considered an additional medical report dated April 16, 1986, presented to the Panel by the worker's representative together with her written submission. This material was entered as Exhibit #2. During the course of the hearing, the Panel also accepted as Exhibit #3 a sketch of the alleged incident site provided in consultation with the worker and subsequently modified to comply with the version of the facts as provided by the employer. Submissions were made by the worker's and the employer's representatives respectively and Tribunal counsel.

THE ISSUE AND HOW IT ARISES

In June of 1983, the worker started his employment as a machine operator and general labourer with the employer. On August 27, 1983, the worker and his co-workers were working at a landscaping job and their duties included the laying of sod and, of particular concern in this case, the unloading of railway ties.

The worker's position is that while he was unloading a railway tie from the truck on August 27, 1983, he injured his back. According to his testimony, he was able to continue to work for the rest of the day, and the following day. It was not until August 29, 1983, in the morning, that he notified the employer of having suffered an injury two days earlier and that he was unable to continue working.

The employer's position is that the worker did not injure his back at any time while in his employment, and that on August 29, 1983, he was not notified of any incident having occurred two days earlier.

The Panel must therefore decide whether the worker injured his back as a result of an accident arising out of and in the course of employment.

THE PANEL'S REASONING

Throughout the hearing the worker and the employer were questioned by their representatives, Tribunal counsel and the members of the Panel. Their evidence regarding a number of events such as the duties performed by the worker at the time of the alleged incident and the reporting of the same are totally different. In this case there was no corroborating testimony by witnesses for either the worker or the employer. However, the Panel had available the transcript of the hearing in front of the Appeals Adjudicator where four witnesses were called to testify by the worker.

Upon a careful review of the available evidence, the Panel is of the view that the worker's testimony is not convincing. The Panel reached this conclusion for a number of reasons.

During the period between the alleged incident and the hearing in front of this Panel, the worker had at least four opportunities to describe the events in issue. In two instances, the worker was interviewed by a WCB investigator, subsequently he offered his version of the facts to the Appeals Adjudicator and finally to the members of this Panel. The four versions of the facts obtained from those depositions reveal several inconsistencies regarding the time when the incident occurred, the number of railway ties that were unloaded, the position of the trailer in relation to the curb, the assistance received by co-workers in the unloading process, the specific circumstances that triggered the alleged incident, the nature of the symptoms felt at the time and during the next two days, the nature of the discussion regarding the alleged incident that the worker had with the co-workers, and the reporting of the alleged incident to the employer.

Furthermore the testimony of the worker is also inconsistent in crucial respects with the testimony of a co-worker called to testify on his behalf by his representative in the proceedings in front of the Appeals Adjudicator. In this respect, the Panel noted that the co-worker offered a different description of the unloading of the railway ties. According to this co-worker, the unloading of the railway ties took place while all the workers were standing on the trailer and not on the ground as indicated by the worker.

Finally, the Panel noted that the testimony offered by the four co-workers to the Appeals Adjudicator is substantially consistent with the testimony given by the employer to the Appeals Adjudicator and to this Panel.

In the opinion of this Panel the evidence submitted supports the following findings:

1. The worker was employed as a labourer by the employer in a landscaping business beginning sometime in June, 1983;

2. The worker was instructed to unload a number of used railway ties from a small flat bed trailer and was assisted by two other co-workers;
3. The employer was on the job site during the day of the alleged incident and the following two days prior to the time when the worker claimed to be unable to continue working;
4. The worker had the opportunity during the three days (August 27, 28, and 29, 1983) to speak with the employer regarding the alleged incident at work, however, he did not;
5. The worker did not speak about the alleged incident with the other co-workers;
6. Even though the employer provided the transportation for the worker to go home on August 29, 1983, there was no indication given by the worker that he was not feeling well as a result of an incident that had taken place at work;
7. It was not until the middle of September, 1983, that the worker called the employer to request an accident report from him for purposes of establishing entitlement to compensation.

On those grounds the Panel reached the conclusion that the worker did not injure his back as a result of an accident arising out of and in the course of employment and therefore the decision rendered by the Appeals Adjudicator should not be disturbed.

DECISION

The appeal is dismissed.

DATED at Toronto this 28th day of May, 1986.

SIGNED: A. Signoroni, D. Mason, D. Beattie.



Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

CA24N
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DECISION NO. 207

Panel Chairman: R. Hartman

Member; B. Cook

Member: D. Grenville

June 1986

RESEARCH AND PUBLICATIONS DEPARTMENT

Workers' Compensation Appeals Tribunal

505 University Avenue, 7th Floor, Toronto, Ontario M5G 1X4
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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 207

THE APPEAL PROCEDURE

The worker sought leave of the Appeals Tribunal to appeal a decision of the Workers' Compensation Appeal Board dated May 13, 1983, pursuant to section 86o(2) and (3).

Submissions by the worker's representative were heard on April 24, 1986, by a Panel of the Appeals Tribunal consisting of R.E. Hartman, Panel Chairman, B. Cook, a member of the Tribunal representative of worker, and D. Grenville, a member of the Tribunal representative of employers.

The worker appeared and was represented by L. Artmont, Constituency Assistant to P. Gillies, M.P.P. The worker's spouse was present as an observer. P. Auron, a member of the Tribunal Counsel Office was present as Tribunal's counsel.

The Panel read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials which were entered as Exhibit #1 to the proceeding. A letter addressed to the Tribunal dated March 5, 1986, from the worker's doctor, Dr. Johnson, was entered as Exhibit #2.

THE ISSUES AND HOW THEY ARISE

The first issue to be addressed by the Panel was whether or not leave could be granted to the worker in accordance with the provisions of the Act. By section 86o(2), a decision of a Panel of the Board may be appealed to the Appeals Tribunal only if leave is granted by this Tribunal. The Workers' Compensation Act expressly sets out the criteria and circumstances in which such leave can be granted in section 86o(3):

"86o(3) Leave to appeal a decision to which subsection (2) applies shall not be granted unless,

(a) there is substantial new evidence which was unavailable at the time of hearing by the Panel; or

(b) there appears to the Appeals Tribunal to be good reason to doubt the correctness of the decision." (Emphasis added.)

Briefly, the facts set out in the materials are as follows. The worker suffered a compensable accident on January 1, 1964. She was employed as a nurse and injured her back helping a patient move from his bed to a chair. She was examined by Dr. Young on January 9, 1964, who diagnosed lumbar disc syndrome, sciatica and sacroiliac sprain. Temporary total benefits were paid from January 4 to January 21, 1964, when the worker returned to her normal duties. The worker continued at her employment until she retired in 1967 at the age of 44.

No further contact with the WCB occurred until 1982 when the worker wrote to the WCB complaining of constant back problems since 1964. She asked that she be assessed for a pension. The claim was investigated and denied by the Claims Review Branch by letter dated May 11, 1982. The worker appealed this denial to the Appeals Adjudicator. A hearing was held on July 21, 1982, before A.G. Simpson. In a decision dated August 27, 1982, her appeal was denied on the basis that there was insufficient evidence to support the worker's contention that her present back disability was as a result of her compensable accident on January 1, 1964.

The worker appealed and on March 14, 1983, a hearing was held before the Appeal Board. A decision of that Board dated May 13, 1983, denied the worker's appeal, after directing further field investigation. In its decision the Appeal Board noted and accepted the following:

- "- The preponderance of medical evidence indicates that the worker's major complaints and treatment related to her back problem commenced following the motor vehicle accident in 1968;
- (The worker) did not become a patient of Dr. R.L. Johnson until 1970;
- The opinion of the Board's surgical consultant that the original claim of January 1964 did not support a claim for a disc problem which was identified after (the worker's) major motor vehicle accident;
- There is insufficient evidence to support (the worker's) contention that her present back disability is the result of her compensable accident of January 1, 1964."

The new evidence on which the worker relied is contained in two letters. The first is a letter dated June 12, 1985, to the worker from the local Chief of Police and is set out below in its entirety:

"In regards to your request for information regarding (the 1968) accident, please be advised our records do not go back as far as this particular date. However, retired Staff Inspector, G. Stoneman, attended the Traffic Office and spoke to Staff Sergeant, R. Campbell. Mr. Stoneman advised he remembers investigating this accident. It was minor in nature and there were no injuries.

Assuring you of our desire to co-operate in matters of mutual interest."

The second letter is from Dr. Johnson, to the Appeals Tribunal dated March 5, 1986. He states that the worker is totally disabled as a result of an ongoing back disability which she has had since she was first his patient in February of 1970. He adds that the disability has been progressive over the years but has proceeded to the extent that she is not even able to fulfill her normal household duties. With respect to the diagnosis and the cause he advises as follows:

"There is no question in our minds about the state of her back. It has onset as a result of prolapsed lumbar disc disease and subsequent arthritic involvement. The prognosis is such that there is no hope for improvement by any therapeutic modality. If anything there is a likelihood that there will be considerable deterioration in the future.

It is unfortunate that we cannot make a direct link with her compensable injury but when the injury was that far remote it is difficult to obtain adequate documentation. Suffice it to say, however, that when treatment was begun in February, 1970 for a degenerative back disease - the condition that exists today is directly descended from that back problem."

The issue for the Panel is whether or not these two letters constitute substantial new evidence which was unavailable at the time of the hearing before the Appeal Board on March 14, 1983. Secondly, after reviewing the transcripts of the hearing and all materials contained in Exhibit #1, does there appear to the Panel to be good reason to doubt the correctness of the decision reached by the Appeal Board in 1983?

THE PANEL'S REASONING

For the purposes of section 86o(3)(b), the Panel must look at the objective record, the transcripts, if available, and the decision of the Appeal Board to come to any decision whether on its face, the correctness of that decision is to be doubted.

From a review of the decision of the Appeal Board dated May 13, 1983, the transcript of the proceedings, and all other documentation contained in the Case Description Materials which were before the Appeal Board as part of the WCB file, there does not appear to the Panel to be good reason to doubt the correctness of the Appeal Board's decision. The Panel notes the medical gap in reporting of back problems between January 1, 1964, and the motor vehicle accident on June 13, 1968. Although the worker claims she retired because of back problems, there is only a record of one medical consultation between 1964 and 1968 with respect to back problems. This was on November 24, 1966. This must be compared with the numerous medical consultations subsequent to the accident on June 13, 1968, and the rapid deterioration as set out in the medical records subsequent to 1970.

With respect to the presentation of new evidence, the legislation directs that leave is not to be granted unless "there is substantial new evidence which was unavailable at the time of the hearing" before the Appeal Board. It is not enough that the evidence be new, it must be of a substantial nature which suggests it must be relevant and weighty to the issues decided.

In this case, we have what is referred to by the worker's representative as a police report but is at best a report of a reported conversation, covering events which occurred in 1968. In the opinion of the Panel this is not substantial evidence. The letter of Dr. Johnson, while it sets out the worker's current disability, contains no new evidence relating to the issue of causation or continuity from 1964 which was decided by the Board.

DECISION

Leave to appeal is denied.

DATED at Toronto this 25th day of June, 1986.

SIGNED: R.E. Hartman, B. Cook, D. Grenville.

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Workers' Compensation Appeals Tribunal

DECISION NO. 212

Tribunal d'appel des accidents du travail

Panel Chairman: N. Catton

Member: R. Apsey

Member: B. Cook



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

June 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 212

THE APPEAL PROCEDURE

This is an appeal by the worker and the employer, of the November 15, 1984, decision of M. Crapper, Appeals Adjudicator. Mr. Crapper's decision upheld the decision of the Claims Review Branch which denied benefits to the worker beyond December 15, 1983, and denied Second Injury Enhancement Fund relief to the employer.

The appeal was heard on April 25, 1986, by a Panel of the Appeals Tribunal consisting of N. Catton, Panel Chairman, R. Apsey, a member of the Tribunal representative of employers, and B. Cook, a member of the Tribunal representative of workers.

The worker appeared and was represented by M. Green, solicitor. The employer was represented by M. Cashman, solicitor.

The worker testified in the Italian language through an interpreter, M. Gracile, who also assisted the worker with understanding the proceedings and the submissions.

The Panel heard and considered the testimony given under oath by the worker and read and considered the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials filed at the hearing as an Exhibit. The Panel also read the Case Description recital of facts prepared by R. Nairn of the Tribunal Counsel Office and agreed to by the parties. Oral submissions were made by Mr. Green and Ms. Cashman.

THE ISSUE AND HOW IT ARISES

The worker sustained an injury to her ankle on February 9, 1983, while at work. Temporary total benefits were paid to the worker until December 15, 1983. On this date the worker's entitlement to benefits ceased as the WCB was of the view that the medical evidence showed that there was no remaining disability in her left ankle which could be related to the original compensable accident at work. The WCB also concluded that there was no evidence of any underlying or pre-existing condition which had caused the disability to be enhanced or prolonged and therefore denied the employer's request for Second Injury Enhancement Fund Relief. These findings were confirmed by the Appeals Adjudicator, Mr. Crapper.

At the time of the accident the worker had been employed as a sewing machine operator with the accident employer for about three years. The employer manufactures furniture. On the day of the accident she was walking towards the cafeteria at break time when she either stepped on or kicked a strip of metal which was ten or twelve inches long and had triangular teeth along one edge. The piece of metal struck the worker on the inside part of her left leg just above her ankle.

There is a dispute as to whether or not the worker also sustained a twisting type injury to her left ankle at the time of this accident. The worker testified at the hearing, as she had at the Appeals Adjudicator hearing that although she cannot recall exactly what happened, she is sure that her ankle twisted and she fell. She states that she did not fall to the floor but rather caught herself on a chair. Ms. Cashman, on behalf of the employer, submitted that there was reason to doubt that the worker had in fact twisted her ankle at the time of the accident. Ms. Cashman referred to the fact that the worker has seen a number of doctors since the original accident and that there are discrepancies in the history of the accident which has been provided by different doctors. Mr. Green on behalf of his client pointed out that the worker speaks Italian and the doctors in question do not. Mr. Green submitted that the language barrier would account for any differences among the histories of accident as provided by the doctors.

The medical reports which are contained in the Case Description Materials also reflect a difference of medical opinion among the various doctors who have assessed the worker as to what, if anything, is wrong with the worker.

Following the accident in February, 1983, the worker was first seen by a specialist in June, 1983, when she was assessed by Dr. Conn, an orthopaedic surgeon. In his report dated June 14, 1983, he stated that the worker "apparently slipped at her work when she was walking, injuring her left ankle." Dr. Conn felt that X-rays taken failed to reveal any obvious abnormality and stated "this woman has had a long time to recover from an ankle sprain." He felt she should be encouraged to return to work.

In the summer of 1983, the worker went to Italy and saw a Dr. Carvello. Dr. Carvello diagnosed "arthralgia and oedema of the left foot."

She was seen by Dr. Conn again in October, 1983, at which time further X-rays were taken. These revealed a soft tissue swelling in the ankle area. Dr. Conn reported that there was no evidence of any continuing abnormality in the ankle joint. On October 20, 1983, the worker was assessed by Dr. Mitchell and Dr. Macfarlane at the offices of the Workers' Compensation Board. Dr. Mitchell subsequently wrote to the worker's family doctor and said "we could not find the tenderness you reported, although she did complain of exquisite tenderness inferior to the medial malleolus and of the tibia. We did not feel there was anything significantly wrong with the ankle that should be keeping him (sic) from work at this stage. Nor is it likely there has been recently."

The day following the examination at the WCB, the worker was assessed by Dr. Handelsman, a rheumatologist. He stated that although the worker had subjective complaints of pain, there were no objective findings to explain her pain. In particular, he found no evidence of tendonitis, arthritis, or poor tissue healing. He did note that she had a long standing problem of cyroglobulinemia, a blood disorder but felt that this was not a factor in her continuing complaints. Dr. Handelsman felt that she should have a course of four to six weeks of physiotherapy.

In December, 1983, the WCB wrote to the worker and informed her that all Workers' Compensation benefits would cease as of December 15, 1983, since, in the opinion of the WCB, she had no remaining disability which could be related to her compensable accident.

In February, 1984, the worker was assessed by Dr. Virgin, an orthopaedic surgeon. He noted that the worker has bilateral pes planus (flat feet). He felt that there was evidence of an injury to the posterior tibial tendon on the left side and suggested that she have surgery to correct the problem which he felt was certainly a very painful condition and one which would make the worker quite unfit to work.

In May, 1984, the worker was assessed by Dr. Basian a vascular surgeon. In a report dated May 10, 1984, Dr. Basian stated "at this time I don't think there is any particular vascular phenomenon to be concerned about ...". Dr. Basian noted the past history of blood disorder and agreed with the previous assessors that this problem was not relevant to the ongoing complaints.

The worker was also assessed by Dr. Edward English, an orthopaedic surgeon and specialist in reconstructive foot care. This assessment occurred on May 16, 1985, and Dr. English's report is dated June 20, 1985. It was accordingly not available to the WCB at the time of the Appeals Adjudicator decision. Dr. English noted a number of problems with the worker's feet. These included: Flat feet with loss of the arches on both feet, a hallux valgus (displacement of the big toe), calluses, flexible claw toes on both sides, and a corn over the fourth and fifth toes on the left foot.

Dr. English had a bone scan conducted to assist him in diagnosing the worker's problem. He reported the following:

"...The interpretation of this bone scan appears to be that of degenerative osteoarthritis in multiple joints in the foot which goes along with my present contention that this lady has a tibialis posterior tenosynovitis in the left side. She has structural abnormalities common to both sides. The deformity is slightly worse on the left side and she is having more symptoms in the left foot and ankle area.

She must have had a minor ligamentous strain or tear of the ankle putting excessive pressure on the tibialis posterior tendon and consequently giving her her symptoms. The bone scan indicates degenerative arthritis in the first metatarsal-phalangeal area, that is the bunion area, as well as in the ankles and the heels. This again is due to degenerative changes, but again it is not giving her any symptoms. The problem in the midtarsal area is all soft tissue. There is no evidence of an old fracture or injury to the foot which is more significant than the tendon problem.

...I do not feel that this patient's symptoms are related to a direct blow to the left ankle, hitting her ankle and causing the laceration to her foot and ankle area. I think that it is probably related to the fact that she had a soft tissue injury, that is a contusion to the foot. She must have twisted the foot at the time of the accident and therefore set up symptoms.

She had the deformity in her feet but the twisting injury does sometimes initiate the symptomatic complaints. This is not a

uncommon problem to develop without any injury at all. It is obvious that from the original accident the injury was that of a soft tissue contusion. The continuing symptoms sometimes mold from one complaint into another so it is easy to miss the diagnosis. Once the soft tissue injuries have healed and a fresh opinion from another doctor listening to the story can very often elucidate a symptom which has been missed by a doctor because he has been taking care of the patient for one problem in one area and then a new problem develops in the same area."

This Panel understands Dr. English's opinion to be that the worker has a number of problems with her feet which were present prior to the compensable accident of February, 1983. The main difficulty however would appear to be an inflammation of a tendon. This inflammation of the tendon or tenosynovitis is related to the compensable accident, providing that it is assumed that the worker twisted her ankle at the time of the original accident. Dr. English has also provided a plausible explanation as to why this diagnosis might have been missed by the treating physicians who first examined the worker.

Dr. English's report went on to discuss his recommendations for treating the patient's problems. He stated that surgery is usually unrewarding and that most patients "settle down reasonably well with arch supports and steroid injections or anti-inflammatory medication." He also stated "It has been my experience that this problem is a continuous problem. It continues to be a problem for the patient over time and does not very often settle down."

The questions which this Panel must answer in this case are firstly whether it is more probable than not that the worker sustained a twisting injury to her left ankle which resulted in a soft tissue injury and an injury to her tendon and secondly whether she has had a continuing disability which could be related to her original compensable accident of February 9, 1983.

THE PANEL'S REASONING

The Panel believes that it is more probable than not that at the time of the compensable incident on February 9, 1983, the worker sustained a twisting type injury to her left ankle. The evidence for this is firstly the worker's evidence under oath at the hearing and before the Appeals Adjudicator. In this Panel's view the worker's explanation of the mechanics of the compensable injury as provided to doctors, the WCB, the Appeals Adjudicator, and the hearing before this Panel have been quite consistent. The Panel accepts Mr. Green's submission that any discrepancies which do exist are minor and are likely explicable by a language barrier. The worker's history of accident is that she twisted her left ankle following the blow to it by the strip of metal. She did not fall down to the ground as she was able to support herself on a nearby chair.

The Panel notes that the doctor's first report of accident which is dated February 11, 1983, the day after the accident, and which was filed by the family doctor, stated as part of the diagnosis provided "possible left ankle strain." Dr. Conn also recorded that the accident involved a strain of the ankle.

Having accepted that the worker sustained a twisting type injury at the time of the original accident, this Panel also accepts the opinion of Dr. English. In contrasting the various opinions which have been offered by specialists who have examined the worker, the Panel notes that the worker has been assessed by four orthopaedic specialists, a rheumatologist, and a blood specialist. The latter two ruled out any problems in their specialties. Dr. Conn and Dr. Macfarlane, a WCB surgical consultant, could not explain the worker's ongoing complaints. This Panel notes however that they were relying on X-ray findings. Dr. Virgin who had the results of a tomogram investigation available to him felt that there was some problem with the worker's tendon. Dr. English a doctor who specializes in foot problems and therefore has a particular expertise in this area, had the benefit of a bone scan investigation, as well as the opinions of the other treating physicians and the results of their investigations.

We also accept Dr. English's opinion that the condition is unlikely to resolve. Dr. English rendered his opinion in June, 1985, two and one half years after the original accident. It is now one year later. This Panel believes, therefore, that the problem is permanent and the worker should be granted a permanent partial disability award, rather than temporary benefits subsequent to December 15, 1983, the date benefits were cut off by the Board in this claim. In reaching this conclusion the Panel notes that there have not been any significant changes in the worker's condition since December, 1983, and that although the diagnosis of the problem was only established in 1985 the treatment for her condition has been consistent since December, 1983.

In accepting the opinion of Dr. English, the Panel also accepts that the worker had conditions which pre-existed the compensable accident and which clearly have contributed to the effect of the original injury. Pursuant to the WCB's policies regarding the Second Injury and Enhancement Fund, and the relief of costs from an employer to that fund, this Panel finds that the worker sustained a minor accident as defined by the policy, that is "an accident expected to cause non-disabling or minor disabling injury with complete recovery". The pre-existing condition is found to be of moderate significance, because the pre-existing condition is a major contributing factor in the worker's continuing disability but, the pre-existing condition was not disabling before the accident at work.

DECISION

1. The worker is found to have had a compensable disability since December 15, 1983, to date and continuing. This disability is permanent. The Panel leaves to the WCB the determination of the nature and quantum of the benefits the worker is entitled to in the light of our finding.
2. The Panel finds that at the time of the Accident on February 9, 1983, the worker had a pre-existing condition of moderate significance. For the purposes of calculating the employer's entitlement to SIEF relief, the Panel finds that

the accident was minor. Pursuant to the Board's policies, this would produce a 75% cost transfer from the employer's cost record to the SIEF.

DATED at Toronto this 13th day of June, 1986.

SIGNED: N. Catton, B. Cook, R. Apsey.

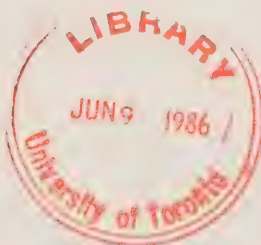
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Workers' Compensation Appeals Tribunal

DECISION NO. 224

Tribunal d'appel des accidents du travail**Panel Chairman: I. Strachan****Member: B. Cook****Member: J. Ronson****LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT****June 1986****Workers' Compensation Appeals Tribunal**

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 224

THE APPEAL PROCEDURE

This is an appeal by the worker of a decision of the Appeals Adjudicator, F.H. Kaliciak, dated August 7, 1985, which denied entitlement for noise-induced hearing loss.

The appeal was heard on May 5, 1986, by a Panel of the Appeals Tribunal consisting of I. Strachan, Panel Chairman, B. Cook, a member of the Tribunal representative of workers, and J. Ronson, a member of the Tribunal representative of employers.

The worker appeared at the hearing and was represented by G. Hicks of the United Auto Workers. B. Cooper appeared on behalf of the employer. P. Auron, a member of the Tribunal Counsel Office assisted the Panel during the hearing.

The Panel read and considered the relevant forms, memoranda and reports extracted from the WCB file and contained in the Case Description which was marked as Exhibit #1. The Tribunal counsel submitted a letter dated April 15, 1986, from Dr. Turliuk which was marked as Exhibit #2 and Mr. Hicks submitted information which he had obtained from the employer relative to changes to the employer's premises over the years. This information was marked as Exhibit #3.

The Panel heard and considered evidence given under oath by the worker and by Mr. Hicks and the information provided by Mr. Cooper.

THE ISSUE AND HOW IT ARISES

The worker has a hearing loss and tinnitus which he relates to his exposure to noise while employed with the employer. The worker was employed by a vehicle manufacturing company from 1955 until 1972.

For his first six months of employment he worked as a hoist operator but this was not particularly noisy. He then worked on the rear axle part of the assembly line. His job was to attach the main spring to the rear axle. He performed this job using a large air gun which tightened four bolts at the same time. He worked on approximately 400 cars per shift and each assembly would take at least 30 seconds.

The worker described this job as being extremely noisy. He said it was impossible to carry on a normal conversation with the person working beside him.

After performing this job for about four years, the worker worked in the front suspension area. His job was to attach and tighten the ball joints - again with an air gun. Although this air gun tightened a single 1 1/4" bolt each time, the worker testified that this gun was louder than the gun he had used in the rear axle

area because it was a heavier and larger gun. He said that the assembly line was approximately 200 feet long and that there were many other people working on the line with air guns. He worked in the front suspension area for approximately 4 years. During the eight years that he worked in the rear axle and the front suspension areas, he also worked at other jobs but only for short periods of time.

In 1964 he transferred to the finalizing department where he worked until 1972 as a driver. In this job he was exposed to considerable noise although not as loud as in the prior jobs. He was forced to take early retirement in 1972 as a result of a non-compensable car accident. He was 57 years old at the time and is currently 71 years old.

Prior to his employment at the vehicle manufacturing company, the worker was employed in the mines in Ontario from 1949 to 1951 as a drill helper. The worker testified that the work in the mines was even louder than the work for the manufacturing company. He also stated that he has never worn hearing protection. The worker testified that he has never engaged in noisy hobbies and that, although he was in the army for some 18 months during world war two, he had limited exposure to guns.

He first noticed problems with his ears about 1965. The first problem that he noticed was the ringing or buzzing in his ears which his doctor has subsequently diagnosed as tinnitus. He also began to notice some loss of hearing at this time. He did not, however, see a doctor until 1968 and then mostly to get some relief from the tinnitus.

Testifying on behalf of the worker, Mr. Hicks indicated that he had started to work with this employer in 1953 shortly after the plant opened. Because of his union activities, he was quite familiar with the various operations in the plant. He testified that over the years the equipment in the plant had been upgraded several times and that the more modern equipment was lighter and considerably quieter.

There is no dispute in this case that the worker has a significant hearing loss. The issue is whether or not his hearing loss is related to his employment in Ontario.

THE PANEL'S REASONING

Paragraph 2.1 of the WCB Guideline on Industrial Noise-Induced Hearing Loss reads as follows:

"2.1 Based on medical advise, INDUSTRIAL NOISE-INDUCED HEARING LOSS CLAIMS are favourably considered when all the following circumstances apply:

2.1.1 There is a clear and adequate history of five or more years of exposure to hazardous noise, 90 decibels "A" scale, for eight hours per day, or equivalent as noted below: (Ontario Ministry of Labour Regulations).

Column 1	Column 2
Sound level - in decibels	Duranton - Hours per 24 hour day
90	8
92	6
95	4
97	3
100	2
102	1 1/2
105	1
110	1/2
115	1/4 or less
Over 115	no exposure

NOTE-Sound levels in excess of 90 decibels ("A" scale), will reduce the 5 or more year exposure requirement.

2.1.2 The frequency level and type of exposure is known.

2.1.3 The average of the four speech frequency levels 500, 1000, 2000, and 3000 Hertz (Hz.) in the American National Standards Institute (ANSI) or International Standards Organization (ISO) audiograms is 25 decibels in each ear.

2.2 Since individual susceptibility to noise varies, claims which do not meet the criteria set out in 2.1 are individually judged on their own merit having regard to the nature of the occupation, the extent of exposure, and any other factors peculiar to the individual case. The benefit of reasonable doubt applies."

The Appeals Adjudicator and the Claims Review Branch denied the worker's claim on the grounds that available noise surveys did not indicate levels greater than 90 db. However, the Panel notes that the record contains a Noise Control Status Report prepared by the employer, apparently in 1971, which shows that workers in the chassis frame line assembly area where the worker was employed, had noise readings well in excess of 90 db. The eight measurements for instruments in this area range from a low of 94 db. to a high of 106 db. The dual nut runner (ie. air gun which runs two nuts at the same time) gave a reading of 103 db. It is not unreasonable to conclude that the old air gun used by the worker in the late 1950's, which ran four nuts at the same time, would make at least as much noise as the dual nut runner tested in 1971. Even in 1971, the entry for the multiple wheel nut runners was listed as 99 db. While the Noise Control Status Report indicates that a worker's exposure during an 8 hour shift is much less than 8 hours, it is sufficient to establish that the air tools create noise levels in excess of 90 db.

In addition, a noise survey conducted in 1984 by the Ministry of Labour, shows intermittent noise of 89 to 94 db. while operating an air gun in the chassis department.

The worker testified that he used the four nut air gun for approximately 30 seconds per vehicle while working in the rear axle department. He also indicated that an 8 hour shift involved approximately 400 vehicles. This translates into approximately 3 1/2 hours of air gun use. In addition, he testified that the worker attaching the other side of the axle on the opposite side of the line also used a four nut air gun to attach the axle to the spring. The Panel accepts the worker's testimony that, for one or two months per year when the plant was busy, he would work a 10 hour shift as opposed to the normal 8 hour shift. This occurred when the worker was in both the rear axle area and the suspension area - a period of approximately 8 years.

With respect to the chart set out in section 2.1 of the WCB policy on "Industrial Noise - Induced Hearing Loss", the Panel notes that, for a sound level of 100 db., only two hours exposure per 24 hour day is required to give rise to a valid claim. The employer's 1971 study indicates that the dual nut runner gave a reading of 103 db. The Panel has concluded that it is probable that the four nut runner used in the late 1950's and early 60's was at least as noisy as the dual nut runner referred to in the 1971 Noise Control Status Report. The worker's 3 1/2 hour exposure during a normal 8 hour shift (which could only be increased by the 10 hour over-time shifts), greatly exceeds the two hour requirement set out in the Board policy. The Panel accepts the evidence of the worker as to the time he was exposed to air gun noise on a daily basis.

The Panel also accepts the testimony of the worker and his representative that the plant was noisier during the period of the worker's employment in the rear axle and front suspension areas than it was in later years. The Panel accepts the worker's testimony with respect to his use of the four nut air gun in the rear axle area and the single nut air gun in the suspension area during his eight years of employment in those areas. In addition, the Panel accepts that the employer's 1971 Noise Control Status Report is a reliable guide to establish minimum noise levels created by the older and noisier equipment used by the worker.

Accordingly, this Panel has no difficulty in concluding that the worker was exposed to a considerable amount of noise in excess of 90 db. during his employment with this employer. The noise exposure, in this Panel's opinion, was more than sufficient for the claim to meet the Board's own criteria for hearing loss and tinnitus claims.

DECISION

The appeal is allowed. The Panel finds that the worker's exposure to noise with the automobile company caused his noise-induced hearing loss.

The Panel leaves to the Board the determination of the amount of benefits to which the worker may be entitled.

DATED at Toronto, this 9th day of June, 1986.

SIGNED: I. Strachan, B. Cook, J. Ronson.

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Workers' Compensation Appeals Tribunal

DECISION NO. 225

Tribunal d'appel des accidents du travail

Panel Chairman: A. Signoroni

Member: J. Connor

Member: S. Fox



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

May 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 225

THE APPEAL PROCEDURE

The worker appeals the April 3, 1985, decision of the Appeals Adjudicator, W.A. Paavola, which confirmed the decision of the Claims Review Branch dated March 26, 1984.

The appeal was heard on May 5, 1986, by a Panel of the Appeals Tribunal consisting of A. Signoroni, Panel Chairman, J. Connor, a member of the Tribunal representative of employers, and S. Fox, a member of the Tribunal representative of workers.

The worker appeared and was represented by A. Calderone, the constituency assistant to Tony Grande, MPP. The employer elected not to appear. The Tribunal was assisted by J. Marshall, in the role of Tribunal counsel.

The Panel heard and considered oral evidence under oath by the worker. N. Pasquali interpreted in the Italian language.

The Panel read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials, which were filed at the hearing, copies having been given to the parties in advance of the hearing. The Panel also read the Case Description recital of facts prepared by Tribunal counsel and agreed to by the worker's representative. Also received at the hearing was other documentary evidence presented by Tribunal counsel. Submissions were made by the worker's representative and Tribunal counsel. A written copy of the submissions made by the worker's representative was also presented to the Panel together with an additional WCB report not contained in the Case Description Materials.

THE ISSUE AND HOW IT ARISES

The worker is fifty-six years old. On June 15, 1983, she was hired as a chambermaid two days a week by a hotel in downtown Toronto. The next day, while standing inside a bathtub, washing the wall, the worker slipped and then fell forward on the edge of the bathtub hurting her knees and back and twisting her ankle.

The incident was not witnessed by any co-worker; however, she reported the accident soon afterwards to her floor supervisor who noticed that the worker was limping. On the same day, she was seen by Dr. P. Sauret, her family doctor, and his diagnosis was abrasion and contusion of both knees and a sprained right ankle. In the opinion of the family doctor the incident disabled the worker from performing her work duties. The Claims Adjudication Review Branch accepted the opinion of Dr. Sauret and granted entitlement.

The worker did not recover quickly from her injuries. She continued to report to WCB and to her doctor throughout the fall and the following spring as she had

persistent pain in her lower back, knees and right ankle, difficulty in bending, difficulty in sitting and standing for prolonged periods and difficulty in getting up and down the stairs at home. In light of those symptoms the family physician ordered physiotherapy and also raised the possibility of a "functional component" as the factor delaying the worker's recovery.

On July 22, 1983, the worker was examined by Dr. G.S. Conn, an orthopaedic surgeon, who remembered having seen the worker for the first time in November, 1981, for a back problem. Further to his examination, Dr. Conn did not see evidence of any serious underlying pathology or traumatic lesion involved as a result of the June 15, 1983, fall in either her knees or her ankle. Dr. Conn concluded that the worker had suffered multiple contusions as a result of the fall, but her major problem was her over-reaction to those injuries.

During the month of October, 1983, Dr. E. Peyrolon, a psychiatrist, examined the patient and found that the worker was suffering from what he called a form of "mild conversion reaction". He also concluded that there was no psychiatric disability and stated his belief that the best treatment for the worker would be to try to start working again. In this report, Dr. Peyrolon further indicated that he had seen the worker several times in 1979.

On December 15, 1983, the worker was re-examined by Dr. Conn at the request of Dr. Mitchell of the WCB. Dr. Conn reported that, except for some discolouration over the patellar tendon area on the left side and a little more than that on the right, he could see no obvious abnormality in the worker. Dr. Conn also stated that he still believed that the worker's basic problem was an emotional one. However, he also noted that the worker had a number of symptoms that could be due to underlying pathology. He therefore suggested a rheumatological assessment and an X-ray of her lumbosacral spine and perhaps even a bone scan. A previous X-ray of the worker's right ankle and foot taken in October, 1983, at the request of the family doctor revealed no recent bone injury. The X-ray requested by Dr. Conn and taken on December 28, 1983, indicated that the discs were well maintained and there was no significant bone or joint abnormality in the lumbar region. There were, however, early degenerative changes in the S.I. joints.

The worker was examined by Dr. S. Handelsman, a rheumatologist on December 29, 1983. On the basis of the worker's report of her symptoms and his own observations, Dr. Handelsman indicated that there were no objective findings supporting the worker's symptoms. However, on the basis of the worker's report of her symptoms and his own observations, he was also of the opinion that "subjectively" the worker had a lot of pain following her June 15, 1983, accident. Dr. Handelsman suggested that her pain response to this last accident might have been primed by a previous accident sustained in 1978. On that occasion the worker suffered a back strain and there is some evidence that she was hospitalized for about twenty days. Dr. Handelsman concluded his report by saying that the only form of therapy that would be to the worker's advantage would be "behaviour modification".

On the strength of this evidence the Claims Adjudication Branch concluded that there was no basis for continued entitlement and, as a result, compensation benefits were finalized as of January 27, 1984.

The worker appealed the decision to finalize her temporary total benefits on January 27, 1984, on the basis that she still suffered constant pain in her back which radiated through both her legs, making them numb at times. As a result of these symptoms she had to take pain killers on a daily basis. The decision of the Claims Adjudicator was confirmed by the Claims Review Branch in a decision dated March 26, 1984.

The worker was further examined by Dr. Handelsman in May, 1984, and in January, 1985. On both occasions the worker reported that neither her low back pain nor the pain or numbness in her legs had improved. As a result of his examination of the worker, Dr. Handelsman concluded that the worker was suffering from a form of "chronic pain syndrome". Dr. Handelsman pointed out that though "subjective", her symptoms were real and significantly disabling her. He felt that it would be unlikely that the worker would be able to return to work either in the near or distant future. Dr. Handelsman further reconfirmed his earlier opinion that the emphasis of her treatment should be on "behaviour modification", and suggested that it might be worthwhile to have the worker assessed at the WCB Hospital and Rehabilitation Centre.

On September 25, 1984, the worker was also seen by Dr. A. Tumiel, an orthopaedic surgeon. He found the worker to be very cheerful and quite a healthy looking person who was freely mobile with normal reflexes. Dr. Tumiel further noted that X-rays of the lumbar spine did not disclose any evidence supporting the worker's complaints of both pain and numbness in the lower extremities. However, noting matatarsalgia of the right foot, Dr. Tumiel suggested a metatarsal bar and a shoe modification.

The worker's appeal of the Claims Review Branch decision of March 26, 1984, was heard on March 26, 1985. The Appeals Adjudicator concluded that the information on file did not establish that the worker had a disabling organic symptomatology as related to the industrial accident of June 15, 1983. It was further ruled that the worker did not establish entitlement for the non-organic component of her disability.

Subsequent to the Appeals Adjudicator hearing, the family doctor provided the WCB with additional medical documents including:

1. Copies of reports he had sent to the Canada Pension Plan. In these reports, Dr. Sauret stated that, in his opinion, the worker was permanently totally disabled due to a combination of organic and psychological disability. There is some evidence that the worker is in receipt of some benefits from Canada Pension Plan.
2. Reports of Dr. J.P. De Lucas, a psychiatrist, covering several appointments with the worker during the period from February, 1984, to February, 1985. In his report dated April 23, 1984, he suggested that "...there seems to be a predisposition for the condition called psychogenic pain disorder, where the psychological component is a predominant contributing factor." In his last report he confirmed his earlier opinion and added that the worker is not amenable to psychotherapy.
3. His own comprehensive report, based on several examinations of the worker during the period from April, 1984, to April, 1985. In his opinion, the family physician found that the worker was suffering from a residual disability

affecting the right and left knee, the lumbar spine and sacrum, plus a severe "conversion reaction". Dr. Sauret concluded that as a result of both organic and functional disability the worker was permanently and totally disabled.

On September 4, 1985, the worker was re-examined by Dr. Handelsman. In his report, he noted that further to his last examination in January, 1985, the worker had been hospitalized at the Doctor's Hospital twice. The first time for pain in the low back and leg and the second time for evaluation of abdominal pain and pain and swelling in the right leg. Dr. Handelsman did not have the results of the tests done at that time but indicated that the worker's venogram showed clots in the lower part of the right leg and that, therefore, the worker was now on 2.5 mg of Coumadin each day. Based on the worker's description of the symptoms and his own examination, Dr. Handelsman concluded that the worker continued to suffer from "a chronic pain syndrome". He further noted that the worker appeared to be quite disabled by her chronic pain, and he was of the opinion that the problem suffered by the worker warranted treatment and that the worker should be admitted to the WCB Hospital and Rehabilitation Centre for evaluation and management as previously recommended. Dr. Handelsman reconfirmed this diagnosis after a further examination of the worker in October, 1985.

The last report before the Panel was prepared by Dr. Conn, who re-examined the worker on January 6, 1986. In his opinion, aside from a little patello-femoral crepitus, there was no evidence of any other organic problem. However, he was of the opinion that a diagnosis of "chronic pain syndrome" was reasonable and stated he could not offer the worker anything orthopaedically.

The issue before this Panel, therefore, is whether the worker remained totally or partially disabled after January 27, 1984, as a result of her June 15, 1983, accident, for either organic or non-organic reasons.

THE PANEL'S REASONING

There is no issue that the worker had a compensable accident on June 15, 1983. As a result of this accident the worker sprained her right ankle and injured her back and knees. The worker suffered two other compensable accidents involving her back. The first one on July 14, 1977, and the second one on October 17, 1978. As a result of these accidents temporary total benefits were paid from July 15, 1977, to November 14, 1977, and from October 18, 1978, to June 1, 1979.

When questioned about her work history, the worker indicated that she came to Canada in 1964, but did not work until 1971. At that time she was employed for three consecutive summer seasons to pick fruit. From approximately 1974 to the beginning of 1977 she did not work. In the early part of 1977 the worker started to work for a Toronto hotel as a chambermaid until her first accident in July, 1977. Even though benefits were finalized in November, 1977, the worker did not resume employment until the summer of 1978, when she accepted a job as a factory worker. After three or four months in this job, the worker suffered her second compensable accident. Subsequent to this accident, with the exception of one day's work as a dishwasher and two days' work to pick fruit, the worker did not resume working until June 14, 1983. One day after, she suffered her third compensable accident. From this chronology, the Panel noted that during the last twenty-two years the worker was in the work force for less than two years in total. Furthermore, during the last eight years the worker only worked three days.

Further to the compensable accident suffered in 1977, the Claims Adjudicator granted on December 15, 1977, for a period of two years, a lump sum award reflecting a residual disability of 10% as a result of her non-organic disability.

There is also evidence that subsequent to the accident sustained in 1978, the worker suffered constant pain. Irrespective of this evidence, the worker's representative argued that the present disability is caused by the June 15, 1983, accident even though the previous two compensable accidents rendered the worker's back particularly vulnerable.

The available medical reports generated by several orthopaedic specialists indicate that there is inconclusive evidence to support a claim of a disability due to organic injury which is work related. The X-rays taken on December 28, 1983, disclose that the worker had early degenerative changes in the S.I. joints. However, there is no evidence before the Panel indicating that these degenerative changes resulted from any one of the three compensable accidents suffered by the worker.

However, the treating physicians are consistent in their opinion that the worker has been totally disabled due to chronic pain "subjectively" real to the worker. This pain, in the opinion of Dr. J.P. De Lucas, cannot be alleviated by any treatment approach. As stated in his June 24, 1984, report:

"... the medical profession is faced many times with this diagnostic dilemma, evaluating the organic cause and correlating this into a psychological effect. According to most authors, who have studied "pain disorder" and specially the well known Dr. Melzak, who has published many articles and books on the subject, there are individuals who are more susceptible and prone to become incapacitated by a physical trauma or injury, and they appear to perceive pain in a different way in respect to its quality and intensity. This lady falls into this category of people, and they cannot be helped by a psychological (sic) treatment approach as they feel quite resistant at the unconscious and partially at conscious level of awareness. There is certain degree of impairment of their inner psychological perception and as it happens in most of these cases there is a combination, of organic, psychological social and cultural factors."

The evidence before the Panel does not address; other than summarily, the issue of what is, from a medical point of view, the probable cause of the chronic pain, and more particularly whether the pain resulted from the compensable accident of 1983.

The Panel noted that as early as 1979 the worker was receiving psychiatric treatment as indicated by Dr. Peyrolon in his report dated October 17, 1983. It should also be noted that this psychiatrist, in the same report, indicated that at the time the best treatment for the worker was to return to work.

The report from the family physician dated April 4, 1984, provides a good summary of the worker's condition during the period from 1980 to 1984.

"The first time I examined this 55 year-old woman was on January 10th, 1980. She was complaining of abdominal pain, "all over". The clinical examination and auxiliary investigations revealed that this patient had a moderate large size hiatus hernia with some reflux. She also had some diverticulosis on the barium enema. The rest of the physical examination was normal...

During the years 1980 and 1981, she had numerous complaints ranging from weakness, pain in the neck, paresthesia of her hands, headaches, back pain, etc. There was a common denominator in many of her complaints and this was a very severe state of anxiety, borderline with hysteria.

On May 1st, 1981 she was admitted to the Doctor's Hospital through the Emergency Department because of a severe attack of asthma. I had referred her to a chest specialist, Dr. Cheng, because of this problem.

She was discharged two weeks later on May 15th, with a diagnosis of asthma, anxiety neurosis and rectal bleeding secondary to diverticular disease.

Her asthmatic attacks were, I repeat, very severe.

On June 8th, 1981 she was re-admitted again with severe dyspnea, caused by intrinsic asthma. She was discharged 10 days later on the 17th of June, 1981 with the diagnosis: intrinsic asthma.

Dr. Cheng stated, "Her asthma started now and there is a very strong emotional overlay in the sense that her asthma is made very much worse by emotional problems. She is a very anxious lady and this keeps the vicious cycle going."

... In addition to the above described illnesses, this patient sustained a low back injury in 1979 and was treated by Dr. E. Upenieks. She was treated by the said doctor for a certain period of time and after 2 or 3 months her Workmen's Compensation Board case was closed. The patient was quite upset about this and came to my office on September 17th, 1981 complaining of back pain, "since I was injured". The back pain was located from L1 to the sacrum.

I treated her for her back until February of 1983. Her case was presented to the Board, accompanied by reports from an orthopaedic specialist Dr. G. Conn and my own reports.

... During 1981, and 1982, this patient continuously complained of low back pain. Sometimes she was limping.

... I mentioned to the Board that there was a very marked functional component in her complaints, but in my opinion, for most of the time this patient was totally disabled for a combination of organic and psychological disability.

During 1982, the patient continued complaining of various symptoms, in addition to the low back pain. These included: "for the last 2 weeks my left arm feels like it is paralyzed", abdominal pain - acidity, etc.

During the first month of 1983, after she received notice that her case was not accepted by the Board, she continued complaining of low back pain. Finally, though, she returned to work on June 13th, 1983 and two days later she fell down and suffered several injuries again.

... This patient, in my opinion is permanently totally disabled due to a combination of organic and psychological disability - hysteria.

The organic disability includes a chronic low back pain, pain in both knees due to a contusion and strain, intrinsic asthma, a large hiatus hernia with reflux, diverticulosis and acute anxiety and hysteria."

In addition to this evidence provided by the family physician there is also evidence submitted by Dr. Conn that the worker was treated by him in November, 1981, because of back problems.

Throughout her testimony before the Panel, the worker had great difficulties to describe any information requested from her. On each occasion she stated that she could not remember. Regarding her credibility, it was noted that Dr. Handelsman, who examined the worker on December 29, 1983, stated that:

"only when she was aware that I was observing her she would walk in an antalgic gait. Otherwise her gait was normal."

In light of the history of non-organic symptomatology suffered by the worker from as early as 1979 in addition to the multiplicity of non-compensable organic problems present at least since 1980, we are of the view it is more probable than not that the disabling chronic pain suffered by the worker is not resulting from the June, 1983, accident.

For this reason we are of the view that although the worker might very well be totally disabled as argued by her representative, she is not entitled either to additional benefits subsequent to January 27, 1984, or to an assessment for a permanent disability award as submitted by the worker's representative.

DECISION

The appeal is dismissed.

DATED at Toronto, this 20th day of May, 1986.

SIGNED: A. Signoroni, J. Connor, S. Fox.



Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

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DECISION NO. 229

Panel Chairman: J. Thomas

Member: B. Cook

Member: D. Jago

June 1986

RESEARCH AND PUBLICATIONS DEPARTMENT

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 229

This section 15 application arises out of a lawsuit commenced by the Plaintiffs, Stanley Opyc and Sonja Opyc. Brian Goosen and Motorways 1980 Limited ("Motorways") are the Defendants. The lawsuit was commenced in the District Court of Ontario in the Judicial District of Thunder Bay under Court file no. 13998/84.

The application was heard in Thunder Bay on May 6, 1986, by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, D. Jago, a member of the Tribunal representative of employers, and B. Cook, a member of the Tribunal representative of workers.

The Applicants were the Defendants, Brian Goosen and Motorways. They were represented by K. Wristen, solicitor. The Plaintiffs, Stanley and Sonja Opyc, were Respondents to the application and were represented by P. Mrowiec, solicitor. J. Marshall from the Tribunal Counsel Office assisted the Panel.

The Panel heard and considered evidence given under oath by P. Pasanen, President of Thunder Bay Welding and Supply Limited ("Thunder Bay Welding"). Thunder Bay Welding was Stanley Opyc's employer at the time of the accident. Mr. Pasanen was called as a witness for the Applicant. The Panel also heard and considered evidence given under oath by Stanley Opyc. The Factum and Supplementary Factum of the Applicants were marked as Exhibit #1. The Factum of the Respondents was marked Exhibit #2. Board Memo #4 dated July 20, 1982, was marked Exhibit #3. The employer's report of the accident dated March 12, 1982, was marked Exhibit #4. The transcript of the examination for discovery of Stanley Opyc on June 17, 1982, was marked Exhibit #5, and a letter contained in the Board file from Mr. Zaitzeff dated June 21, 1982, was marked Exhibit #6. Submissions were made by K. Wristen, P. Mrowiec, and J. Marshall.

THE ISSUE AND HOW IT ARISES

In the early hours of the morning of March 10, 1982, Stanley Opyc left his home near Kakabeka Falls in a welding truck owned by his employer and drove to Ignace, Ontario, to deliver welding supplies for his employer. Ignace is northwest of Thunder Bay on Highway 11/17. After completing his welding assignments, Mr. Opyc headed back towards his home, driving in a southeasterly direction on Highway 11/17.

Sistonen's Corners is on Highway 11/17 between Ignace and Thunder Bay. It is at the junction of Highway 11/17 and Highway 102. Upon arriving at Sistonen's Corners, a driver heading southeast on Highway 11/17 can either continue in a southeasterly direction on Highway 102 or can turn south on Highway 11/17. Continuing on Highway 102 brings one directly into Thunder Bay after approximately a 30 minute drive. Turning south on Highway 11/17 at Sistonen's Corners takes one to Kakabeka Falls. From Kakabeka Falls one can also reach Thunder Bay by heading due east on Highway 590. Both routes, from Sistonen's Corners, then, lead to Thunder Bay. Stanley Opyc reached Sistonen's Corners on March 10 at approximately 7:50 p.m. He turned south on Highway 11/17 in order to get to his home. He intended to leave the truck at his house overnight and return it to his employer's premises in Thunder Bay the next morning by going to work along Highway 590.

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 229

IN THE MATTER OF an action commenced in the
District Court of Ontario in the District of
Thunder Bay as Action No. 13998/84;

AND IN THE MATTER OF an application pursuant
to Section 15 of the Workers' Compensation
Act, R.S.O. 1980, c. 539, as amended.

B E T W E E N:

BRIAN GOOSEN and MOTORWAYS 1980 LTD.

Applicants in this application
and Defendants in the District
Court action.

- and -

STANLEY OPYC and SONJA OPYC

Respondents in this application
and Plaintiffs in the District
Court action.

Just after turning south on Highway 11/17 after leaving Sistonen's Corners, Stanley Opyc was involved in a collision with the pup trailer of a tractor trailer unit operated by the Applicant Brian Goosen and owned by the Applicant Motorways. Mr. Goosen was northbound on Highway 11/17. Stanley Opyc was seriously injured in the accident.

After the accident, Stanley Opyc started receiving Workers' Compensation benefits. However, by Writ of Summons issued on March 2, 1984, in the District Court of Ontario, in the Judicial District of Thunder Bay, Stanley Opyc commenced a lawsuit against Brian Goosen and Motorways. Included in the lawsuit was a claim by his wife, Sonja Opyc, under section 60 of the Family Law Reform Act.

The issue before this Tribunal is whether Stanley Opyc's right to sue the Defendants has been taken away by Part 1 of the Workers' Compensation Act. In the event that this Panel were to so conclude, a subsequent issue is whether Sonja Opyc's right of action under the Family Law Reform Act can be sustained.

THE PANEL'S REASONING

In certain circumstances, the Workers' Compensation Act allows a worker to choose between claiming Workers' Compensation benefits or commencing a lawsuit.¹ This process is called an election. It is permitted by section 8(1) of the Act.

"8(1) Where an accident arising out of and in the course of his employment happens to a worker under such circumstances as entitle him or his dependants to an action against some person other than his employer, the worker or his dependants, if entitled to benefits under this Part may claim such benefits or may bring such action."

To be eligible for an election, the accident must arise out of and in the course of the worker's employment and the lawsuit must be against someone other than the worker's employer.

If the worker was employed by a Schedule 1 employer at the time of his accident, the Act imposes other restrictions on the worker's right to sue.

"8(9) No employer in Schedule 1 and no worker of an employer in Schedule 1 or dependant of such worker has a right of action for damages against any employer in Schedule 1 or any worker of such employer, for an injury for which benefits are payable under this Act, where the workers of both employers were in the course of their employment at the time of the happening of the injury, but, in any case where the Board is satisfied that the accident giving rise to the injury was caused by the negligence of some other employer or employers in Schedule 1 or their workers, the Board may direct that the benefits awarded in any such case or a

¹The Workers' Compensation Act as it existed pre-April, 1985.

proportion of them shall be charged against a class or group to which such other employer or employers belong and to the accident cost record of such individual employer or employers."

This means that a Schedule 1 worker, or a dependant of a Schedule 1 worker, in addition to not being able to sue his employer, cannot sue any other Schedule 1 employer or worker of such employer in circumstances where both workers at the time of the happening of the injury were in the course of their employment.

Thus, if two workers of two different Schedule 1 employers are involved in an accident, and at the time of the accident both workers are in the course of their employment, their right to sue is taken away and the worker is restricted to claiming Workers' Compensation benefits.

Where a dispute arises as to whether the right to sue has been taken away by section 8(1) or 8(9), the matter is resolved by way of an application to the Appeals Tribunal under the authority of section 15 of the new Act.²

"15. Any party to an action may apply to the Appeals Tribunal for adjudication and determination of the question of the Plaintiff's right to compensation under this Part or as to whether the action is one the right to bring which is taken away by this Part, or whether the action is one in which the right to recover damages, contribution, or indemnity is limited by this Part, and such adjudication and determination is final and conclusive."

In this case, the parties admitted at the outset of the hearing that both Motorways and Thunder Bay Welding are Schedule 1 employers. It was also admitted that at the time of the accident, Brian Goosen was an employee of Motorways and was in the course of his employment. It was admitted that Stanley Opyc was an employee of Thunder Bay Welding at the time of the accident. Thus, in determining whether the right to sue has been taken away by Part 1 of the Act, the sole issue before this Panel is whether Stanley Opyc, at the time of the accident, was in the course of his employment.

It was also agreed by the parties that at the time of the accident Stanley Opyc was on his way home in a vehicle owned by his employer. There was nothing improper about keeping the employer's vehicle at his house overnight. In fact, he had obtained verbal permission from Mr. Pasanen several years earlier to keep the vehicle at his house overnight when going on trips to places west of Thunder Bay. He would leave his own vehicle at Thunder Bay Welding in Thunder Bay the evening before he was to depart on a westerly trip and would load up the employer's vehicle with work orders and cylinders for the next day's work. He would then drive the employer's vehicle to his home at Kakabeka Falls and keep it there overnight. The next morning he would head out on his run and return to his home the same or next evening. The following morning he would drive the truck back to Thunder Bay Welding with empty cylinders and completed work orders. It was an arrangement that

²The Workers' Compensation Act as it exists after April, 1985.

benefited Mr. Opyc in that it gave him a head start from Kakabeka Falls on westerly trips. It saved him driving east into Thunder Bay, and then heading back out on a westerly route.

Mr. Pasanen stated that the arrangement also benefited the employer because it saved a significant amount of driving time for which the worker was entitled to be paid.

This is exactly what took place when Mr. Opyc drove to Ignace on March 10, 1982. He kept the truck at his home near Kakabeka Falls on the evening of March 9 and headed out for Ignace early in the morning of March 10, intending to return to his home in the company truck that evening.

On behalf of the Plaintiffs, Mr. Mrowiec argued that under the terms of the employment arrangement between Mr. Opyc and his employer, he ceased being in the course of his employment on the evening of March 10, 1982, as soon as he passed through Sistonen's Corners and turned down Highway 11/17. Mr. Mrowiec argued that this arrangement, although not reduced to writing, could be inferred from the way Mr. Opyc was paid. Normally he was paid on an hourly basis from 8 a.m. to 4:30 p.m. If he worked overtime, as he did on March 10, 1982, he was paid time and one-half and he kept track of the overtime hours on his own. Mr. Opyc told the Panel that when he went on the trip to Ignace, he would not begin to count overtime hours until he reached Sistonen's Corners. Similarly, on his return from Ignace, he would stop keeping track of overtime hours when he reached his Sistonen's Corners and turned south towards his home. The trip from Sistonen's Corners to his home near Kakabeka Falls would, therefore, according to Mr. Mrowiec, be a personal trip home. Similarly, when he got up the next day and drove to Thunder Bay, he would not be paid for the trip east to Thunder Bay along Highway 590 because it was his regular drive to work.

The employer disagreed with the description of the method of calculating overtime pay. According to Mr. Pasanen, the worker was entitled to be paid for his overtime hours when heading home from Ignace, including the portion of the trip after passing through Sistonen's Corners. Mr. Pasanen thought that the only portion of the trip for which the worker could not properly claim overtime would be a very short stretch of road heading west off Highway 11/17 to Mr. Opyc's home. In Mr. Pasanen's view, although there was nothing in writing to support this arrangement, he pointed out that it was reasonable for Mr. Opyc to be entitled to payment while on Highway 11/17 and Highway 590 because it was an alternate route to return the vehicle to Thunder Bay Welding after completing the Ignace trip. He pointed out that it took approximately the same length of time to reach Thunder Bay from Sistonen's Corners whether one went along Highway 102 or whether one headed south on Highway 11/17 and then east on Highway 590. The only advantage to Mr. Opyc in choosing the latter route was that it enabled him to reach his home and store the vehicle overnight.

This Panel has considered carefully the materials contained in the exhibits and the evidence of Mr. Pasanen and Mr. Opyc. We find that both witnesses were trying their best to accurately recall the overtime pay arrangement. We conclude that what has probably occurred is a misunderstanding between Mr. Opyc and Mr. Pasanen as to the overtime payment arrangement. In accepting Mr. Pasanen's evidence we conclude that the worker was entitled to be paid overtime while on Highway 11/17, even at the point where it turns south from Sistonen's Corners. In accepting Mr. Opyc's evidence, we conclude that he did not charge for the portion of the trip after passing Sistonen's Corners heading southeast.

In our view, whether or not Mr. Opyc in fact charged for his overtime, we are satisfied that he was entitled to be paid while on Highway 11/17 south of Sistonen's Corners, and accordingly was entitled to be paid overtime when the accident occurred.

Was the worker in the course of his employment? As a general rule, a worker is in the course of his employment if he is engaged in the performance of duties for the employer or is doing something incidentally related to his employment. In the case of employees who are, by the nature of their work, obliged to travel, the issue of whether the worker is in the course of his employment is often determined by considering whether the worker made a distinct departure from his intended route for purely personal reasons. The difficulty in deciding whether or not the accident occurred in the course of employment is aptly described in the following passage from Decision No. 2, British Columbia Workers' Compensation Reporter, Volume 1, 1973-74, Page 7:

"The claim raises a dilemma that has always been inherent in workmen's compensation. The difficulty, of course, is that the activities of men are not neatly divisible into two categories, their employment functions and their personal lives. There is a broad area of intersection and overlap between work and personal affairs, and somewhere in that broad area we must map the perimeter of workmen's compensation. An incidental intrusion of personal activity into the process of work will not require a claim, otherwise valid, to be denied. For example, it has long been accepted that compensation is not limited to injuries occurring in the course of production. Where a person is injured while at work in the broader sense of that term, a claim will not be denied on the ground that at the precise moment of injury he was blowing his nose, using the toilet or having his coffee break. Similarly, it has long been accepted that when a truck driver stops for a meal in the course of a long journey and is injured while crossing the road, he is just as much entitled to compensation as a factory worker injured on his way to the works canteen. Conversely the intrusion of some aspect of work into the personal life of an employee at the moment when he suffers an injury will not entitle him to compensation. For example, if someone slips in the living room at home and is injured, he is not entitled to compensation simply on the ground that at the crucial moment he had in his hand a book relating to his work that he was reading. In the marginal cases, it is impossible to do better than weight the employment features of the situation in balance with the personal features and reach a conclusion (which can never be devoid of intuitive judgment) about which should be treated as predominant."

Decision No. 2 suggests a number of indicators to be considered in the marginal cases:

"(N)o single criteria can be regarded as conclusive for deciding whether an injury should be classified as one arising out of and in the course of employment. Various indicators can be and are commonly used for guidance. These include:

- whether the injury occurred on the premises of the employer;
- whether it occurred in the process of doing something for the benefit of the employer;
- whether it occurred in the course of action taken in response to instructions from the employer;
- whether it occurred in the course of using equipment or material supplied by the employer;
- whether it occurred in the course of receiving payment or other consideration;
- whether the risk to which the employee was exposed was the same as the risk to which he is exposed in the normal course of production;
- whether the injury occurred during a time period for which the employee was being paid;
- whether the injury was caused by some activity of the employer or a fellow employee;

This list is by no means exhaustive. All of these factors can be considered in making a judgment, but no one of them can be used as an exclusive test."

In this case, the evidence establishes that at the time of the accident the worker was using a vehicle supplied by his employer. He was in the process of completing an assignment at the request of his employer. He was choosing one of two acceptable routes to complete the assignment. Although he was heading home, he was also in the process of returning the vehicle to the employer's premises and the overnight arrangement at home was a benefit not only to the worker but also to the employer. The worker, at the time of the accident, was entitled to be paid, and this is a more important consideration in determining whether the worker was in the course of his employment than whether he in fact had taken the necessary steps to be paid.

These factors, taken together, lead this Panel to conclude that the worker was in the course of his employment at the time of the accident. In our view, the worker was still in the course of performing duties for his employer and had not made a distinct departure from his intended route for purely personal reasons. His right of action, accordingly, is taken away by Part 1 of the Act.

Having reached this conclusion, we must consider whether Sonja Opyc's right of action under the provisions of the Family Law Reform Act are affected by the provisions of the Workers' Compensation Act and by our finding with respect to Mr. Opyc's right of action.

On a preliminary matter, we are of the opinion that the Appeals Tribunal has the jurisdiction to make a determination about whether right of action founded under the Family Law Reform Act has been taken away by the provisions of the

Workers' Compensation Act. Section 15 contemplates any party to an action bringing an application to the Appeals Tribunal "for adjudication and determination of the question of the plaintiff's right to compensation under this Part, or as to whether the action is one the right to bring which is taken away by this Part..." In their Factum, the Applicants, who are parties to an action, have applied for a determination of the rights of both Stanley and Sonja Opyc to bring and maintain their actions. One of the issues raised by the Applicant's Factum is whether Part 1 of the Workers' Compensation Act has taken away Sonja Opyc's right of action. The words of section 15 support a determination of this issue by the Appeals Tribunal. In our view, section 15 confers on the Appeals Tribunal exclusive jurisdiction to determine, at the request of any party to an action, the issue of whether the action is one the right to bring which is taken away by Part 1 of the Workers' Compensation Act. Thus, even if the claim is established under the Family Law Reform Act, it is for the Appeals Tribunal to determine whether the claim has been taken away by Part 1 of the Workers' Compensation Act.

Our conclusion on the matter of jurisdiction is in accord with two decisions of the Divisional Court, Re Butler Trucking Co. et al and Brydges et al, 46 O.R.(2d) 686; and Re Terzian et al and Workmen's Compensation Board et al, 42 O.R.(2d) 144. In the Butler decision, Griffiths, J., states, at page 691:

"In our view, section 15 of the Workers' Compensation Act confers on the Board an exclusive jurisdiction to determine the rights of the parties to maintain an action even where the rights of the parties are only indirectly effected by the provisions of Part 1 of the Act and even though those parties may not claim benefits under the Act."

Reference to the Board in the above quotation stems from the pre-October 1985 exclusive jurisdiction of the Appeal Board which, by section 15 of the new Act, has been transferred to the Appeals Tribunal. In the Terzian decision, Krever, J., in considering an application for judicial review of a section 15 decision of a Workers' Compensation Appeal Board, approved of the Appeal Board's determination of the rights of dependants to sue under the provisions of the Family Law Reform Act.

On Sonja Opyc's behalf, it was Mr. Mrowiec's submission that a claim by dependants under the provision of the Family Law Reform Act is an independent statutory cause of action which cannot be affected by a determination of Mr. Opyc's right to sue. In support of his argument, Mr. Mrowiec made reference to the Ontario Court of Appeal decision of Lewis v. Low, 45 O.R.(2d) 436. Ms. Wristen on the other hand, argued that the Butler and Terzian decisions established that a claim by dependants under the Family Law Reform Act is derivative to the claim of the injured or deceased person and that if the latter's cause of action is extinguished, so is the claim of the dependants

Section 60(1)³ of the Family Law Reform Act provides as follows:

"60(1) Where a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not

³Section 61(1) of the new Family Law Act contains substantially the same wording and applies to actions commenced on or after March 1, 1986.

killed, the spouse, as defined in Part II, children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction."

In this case, the person injured was Mr. Opyc.

Mrs. Opyc, as a dependant under the Family Law Reform Act, has a statutory cause of action which is conditional upon a finding that Mr. Opyc is entitled to recover damages. As noted in the Butler decision, at page 689:

"In our opinion, the right of action of the parents, brother and sisters of a deceased person under section 60 of the Family Law Reform Act is purely a derivative action depending on the entitlement of the deceased to personally maintain an action for damages in the circumstances of the accident if he had not been killed."

In this case, we have made a determination that Mr. Opyc cannot maintain his action against the Defendants. Accordingly, he is not entitled to recover damages. If Mr. Opyc is not entitled to recover damages, then Mrs. Opyc's statutory cause of action does not exist. It is a derivative action, dependant upon her husband's entitlement to recover damages, which does not exist because he cannot bring or maintain an action for damages.

A similar conclusion was reached in the Terzian decision, at page 146:

"The Board committed no jurisdictional error in finding, as it had every right to do, that the male Plaintiff's injuries were sustained in the course of his employment. Finally, we can see no error in extending the determination that the right to pursue the cause of action in the ordinary courts has been removed, to Mrs. Terzian because her claim is dependant upon the right of Mr. Terzian and in turn, his right to sue for damages has been determined by the Board to have been taken away by Part 1 of the Act."

Moreover, we do not think that the Court of Appeal decision in Lewis v. Low addresses the point under consideration here. In Lewis v. Low the court considered a situation in which the husband was seriously injured in an automobile collision caused by a third party. There was no question that the husband had a right of action, but he elected to claim benefits under section 8(1) of the Act. As an employee of a Schedule 2 employer, section 8(9) of the Act did not affect his right of action. The issue before the court was whether his wife, as a dependent under the Family Law Reform Act, had an independent cause of action or whether the employer subrogated claim encompassed the wife's claim as well as the husband's. The Court of Appeal did not consider the phrase in section 60(1) "under circumstances where the person is entitled to recover damages". In other words, the derivative aspect of section 60 was not an issue before the Court of Appeal.

Accordingly, we conclude that Mrs. Opyc's right of action under the Family Law Reform Act cannot be sustained. This conclusion is not inconsistent with the overall intent of section 8 of the Workers' Compensation Act. Schedule 1 employers pay into an accident fund. Compensation claims are paid from this fund. In the normal course of events, where a worker suffers an injury by accident arising out of and in the course of his employment, he is entitled to compensation benefits as determined by the Workers' Compensation Board. If he is employed by a Schedule 1 employer, those benefits are paid from the accident fund. If employed by a Schedule 2 employer, the employer is individually liable to pay the compensation benefits of the worker.

All Schedule 1 employers pay into the accident fund, in amounts determined by the Board through a classification system. The compensation scheme was intended to replace lawsuits between workers and employers. Thus, under section 8(1) the worker cannot sue his employer. Because all Schedule 1 employers pay into a common accident fund which is the source of benefits paid to all injured workers employed by Schedule 1 employers, section 8(9) prevents workers from suing not only their own employer, but any other Schedule 1 employer or worker.

Moreover, the Workers' Compensation scheme is an income replacement scheme. Monetary payments are calculated on the basis of pre-accident earnings. It does not provide benefits to dependants of an injured worker unless the worker is killed. It does not, for example, provide dependants of injured workers with money to compensate for the loss of guidance, care and companionship.

Thus, when a worker of a Schedule 1 employer is injured by a worker of another Schedule 1 employer, and both are in the course of their employment at the time of the happening of the injury, the worker must turn to the Act for benefits in the form of income replacement. The worker's dependants are not entitled to any workers' compensation benefits in that situation. Thus, it is suggested, the Workers' Compensation Act never intended that dependants of injured workers of Schedule 1 employers would have a claim against other Schedule 1 employers. If a dependant's right of action under the Family Law Reform Act was not a derivative one, it would open the door for dependants of injured workers to assert claims against Schedule 1 employers. The Workers' Compensation Act itself does not permit dependant claims for compensation benefits and does not permit workers to bring lawsuits against other Schedule 1 employers. It would be, in our view, a significant departure from this legislative intent to permit dependants, by way of other legislation, an independent right of action against Schedule 1 employers.

THE DECISION

The application is allowed. We conclude that the right of Stanley and Sonja Opyc to bring and maintain their lawsuit against Brian Goosen and Motorways has been taken away by the provisions of Part 1 of the Workers' Compensation Act.

DATED at Toronto this 24th day of June, 1986.

SIGNED: J. Thomas, D. Jago, B. Cook.

WCAT No. 85 A 0677
District Court No. 13998/84

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 229

IN THE MATTER OF an action commenced
in the District Court of Ontario in
the District of Thunder Bay;

AND IN THE MATTER OF an application
pursuant to Section 15 of the Workers'
Compensation Act.

B E T W E E N:

BRIAN GOOSEN and MOTORWAYS 1980 LTD.

Applicants

- and -

OPYC

Respondents

WORKERS' COMPENSATION ACT
SECTION 15 APPLICATION

Workers' Compensation Appeals Tribunal

DECISION NO. 230

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: B. Cook

Member: D. Jago

LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

June 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 230

THE APPEAL PROCEDURE

The worker appeals the October 15, 1982, decision of the Workers' Compensation Board Appeals Adjudicator, M. Prpic, in which entitlement for a neck disability from May 15, 1981, was denied on the grounds that the disability was not related to an accident on November 14, 1978, but was caused by degenerative cervical disc disease.

The appeal was heard on May 6, 1986, in Thunder Bay, by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, B. Cook, a member of the Tribunal representative of workers, and D. Jago, a member of the Tribunal representative of employers.

The worker attended and was represented by M. Petryshyn, solicitor. No one appeared from the employer company. J. Marshall from the Tribunal Counsel Office attended the commencement of the hearing.

The Panel had before it Case Description Materials which were marked as an exhibit. The worker gave oral evidence under oath and was questioned by M. Petryshyn, and by members of the Panel. Submissions were made by the worker's representative.

THE ISSUE AND HOW IT ARISES

The worker was involved in a work-related motor vehicle accident on November 14, 1978. The truck he was driving skidded to the side of the road and turned onto its side. The worker did not stop work as a result of the accident but was assigned lighter duty work for a period of time after the accident. In 1979, the worker was off work on two occasions, May 21 to June 18, 1979, and September 25 to October 9, 1979, on account of cervical pain. On both occasions the worker received temporary total disability benefits.

On November 15, 1979, the worker laid off work because of a knee disability. He did not return to work until January 12, 1981. Upon his return to work in January, 1981, he was employed as a gravel truck driver until April, 1981. He then worked with a boom crew for a period of about one month. In March, 1981, he complained about neck pain. On May 4, 1981, he was examined for his neck problem. He returned to work on May 7, for approximately a week doing yard duties, which involved cleaning the yard, and picking-up pieces of wood, some of them quite large. On May 15, he saw Dr. Remus, an orthopaedic surgeon, under whose care he had been for a number of years, and complained about increasing neck problems. He did not return to work thereafter and still remains off work.

The medical evidence indicates that the worker has experienced some degree of neck disability from and after May 15, 1981. The issue before this Panel is whether the neck disability is related to his employment. More specifically, was the worker's neck disability after May 15, 1981, caused by his compensable accident of November 14, 1978, was it caused by the nature of the work performed by the worker, particularly during the period January to May, 1981, or is the worker's neck disability not work related?

THE PANEL'S REASONING

The worker told the Panel that before the industrial accident of November 14, 1978, he was experiencing some pain in his neck but he was able to keep it under control by taking pain killers. He told the Panel, and his testimony is supported by a letter from Dr. Remus dated April 15, 1976, that he first experienced neck problems in November, 1975, when he experienced "a sharp pulling discomfort in his neck" while lifting a heavy bag of salt. He went to a doctor on that occasion but did not lose any time from work. The incident was not reported to Workers' Compensation and no claim was established.

The worker told the Panel that as a result of his 1978 accident, he hurt his back, neck, head and ribs. He sought medical attention. An X-ray report from the McCauslin Hospital confirms that the worker was examined after his November, 1978, accident and X-rays were taken. An X-ray taken November 23, 1978, indicated:

"Cervical Spine

There is fractional narrowing of the disc at C5 and 6. No other abnormality is seen."

Following his accident, the worker was assigned to a camp custodian - watchman job for a month or two. He then returned to work as a truck driver and performed this job until November 15, 1979, when he laid off on account of his knee disability.

A report from Dr. Remus dated April 27, 1979, indicates

"Complaints of headaches, neck pain, and stiffness with pain radiating into the left shoulder and down into the outer aspect of his left elbow."

At that time, Dr. Remus diagnosed his symptoms as:

"chronic cervical thoracic strain initiated by an accident in November, 1978. He did have pre-existent symptoms of neck and low back pain for which I was treating him in 1976."

An X-ray report in May, 1979, detects no abnormality of the cervical spine. A hospital discharge report dated June 16, 1979, describes his complaints of neck and low back pain and indicates

"He was essentially pain free at the time of discharge home June 16."

The worker received temporary total benefits for the period May 21 to June 18, 1979. The basis for granting entitlement was a memo from Dr. Hopper, a WCB Medical Consultant, dated August 7, 1979:

"it is my view that this man has suffered aggravation of degenerative disease in his neck in his compensable incident and it may well be that some of this has been persisting. I feel that this a benefit of unresolvable doubt situation."

A report from Dr. Remus dated September 6, 1979, notes complaints of increasing neck pain in the past few months and states:

"On examination his range of movement of the cervical spine was restricted particularly with respect to full flexion and extension."

On September 27, 1979, Dr. Remus wrote the Workers' Compensation Board and authorized a period of time off work for two weeks from September 24, 1979. Again temporary total benefits were granted for this period of time.

After the worker laid off work on November 15, 1979, there are no medical reports until a hospital Discharge Report dated August 20, 1980, in which Dr. Remus notes:

"The patient had put some weight on recently and was now somewhat obese, perhaps 20 pounds overweight but he otherwise appeared to have only mild restriction range of movement of the cervical spine where he has been treated in the past for cervical spondylosis."

There are no other medical reports for the period of time during which the worker was off work on account of his knee disability.

The next medical record related to the worker's neck problem is an X-ray report from St. Joseph's General Hospital dated March 5, 1981:

"Cervical Spine

There is prominence of the transverse process of C7 on both sides, with a rudimentary cervical rib on the right.

There is no recent bony injury or bony abnormality.

There is very minimal or early cervical spondylosis from C3 to C6, with very minimal disc narrowing at C3-C4 posteriorly."

Along with the X-ray report is a note from Dr. Remus to indicate that "once again, he is developing a recurrence of his symptomatic cervical spondylosis. His range of movement of his cervical spine is still mildly restricted with some accentuation of pain on vertex compression but he has a full range of movement of the joints of the upper extremities with no obvious neurological deficit noted."

At the time of this report, the worker had returned to work as a gravel truck driver.

Sometime in April, the gravel truck job came to an end and the worker was assigned to a boom crew. The worker indicated that this job involved carrying chains weighing up to 80 pounds onto booms and wrapping them around logs. He did this job for a month.

On May 5, 1981, he went to see Dr. John Hay in Terrace Bay because of problems with his neck. According to Dr. Hay's first report to the Board the prognosis was that the worker would be fit for regular work on May 6 or 7, 1981. The worker told the Panel he disagreed with Dr. Hay on this prognosis and made an appointment to see Dr. Remus.

He visited Dr. Remus on May 15, 1981, and in Dr. Remus' letter dated May 15, 1981, he indicated:

"Although he is getting around well with his knee, his major problem is cervical spondylosis with bilateral cervical neuritis. His job consists of a lot of bending and lifting. He has a soft cervical collar at home and a portable home cervical traction apparatus. I think he should stay off work for one week."

During the week preceding his visit to Dr. Remus on May 15, 1981, the worker told the Panel that he was assigned to yard duties which involved lifting logs, some as long as 8 feet, and clearing them from the yard. The worker told the Panel that apparently this was, in the employer's opinion, a light work job.

After May 15, 1981, the reports of Dr. Remus indicate continuing pain and a diagnosis of cervical spondylosis. This information is contained in reports dated July 9, 1981, September 23, 1981, October 22, 1981, and on further reports from 1982, up to and including a report of Dr. Remus dated December 11, 1984.

In 1982 the Board referred the worker to an independent orthopaedic specialist, Dr. John Zeldin. After reviewing the worker's present and past complaints, Dr. Zeldin stated:

"Taken in balance accordingly I would think that it is fair and reasonable to conclude that patient's symptoms of neck and shoulder discomfort are consequent upon chronic myofascial strain which was aggravated by the injury of 1978. At the present time I would think that patient is limited for heavy lifting and bending, but I would not consider that he is completely incapacitated for less demanding activities."

The evidence before the Appeals Tribunal indicates that before his accident on November 14, 1978, the worker was experiencing some problems with his neck. It may be that the source of his pre-November, 1978, problems was a degenerative cervical disease. It may be that the source of his problems was the incident of 1975 for which a claim has not been established. It may be a combination of both factors. The Appeals Tribunal can only deal with matters which have been finally decided by the Workers' Compensation Board. Because a claim has not been established for the 1975 incident, we must assume for the purposes of this decision that any problems which the worker experienced before his November, 1978, accident are not related to an incident for which a Workers' Compensation claim has been established. This does not, of course, preclude the worker from establishing a claim for the 1975 incident.

In making this assessment about the worker's pre-November, 1978, condition, we stress that the evidence contained in the 1976 medical report of Dr. Remus and the worker's testimony establishes a condition of neck discomfort that was controlled

by medication. We are therefore somewhat puzzled by the Workers' Compensation Board report of Dr. H.J. Grossman, dated September 1, 1982, as contained in memo #38 which states:

"I do not accept that the usual course of the cervical degenerative disc disease was altered in any way by the 1978 accident and I feel that Dr. Zeldin's comment of the patient's symptoms of neck and shoulder discomfort as being related to the injury of 1978 are valid. Dr. Zeldin was obviously not aware of the serious degenerating disc disease symptoms that this patient had had before the accident and in any case the present symptoms are more related in my opinion to the degenerating disc disease than any evanescent possible continuation of a muscle strain which in my opinion had resolved long before the May 1981 complaints."

In our view, although there is evidence in the file of degenerating disc disease prior to the 1978 accident, there is not evidence of serious degenerating disc disease symptoms. What there is evidence of is a worker with a neck problem prior to 1978 which was controlled by way of medication.

We are also satisfied that the worker's neck problems in 1979 arose out of his November, 1978, accident, probably by way of an aggravation of his pre-existing condition. There is a reasonably complete continuity of complaint, although the worker's neck condition seems to markedly change from a totally disabling one to a situation in which the worker was "pain free" as of June 16, 1979.

We note that although the worker testified that he continued to experience neck pains during his lay off for his knee disability, he also testified that his neck condition greatly improved when he wasn't at work. This evidence tends to be supported by an absence of medical reports from late 1979 to March, 1981, with the exception of a report in August, 1980, which only incidently mentions the worker's cervical spine condition.

When the worker returned to work in January, 1981, the jobs he worked on appear to this Panel to be extremely heavy ones. As a gravel truck driver, there is evidence in the file that his job involved a lot of bouncing up and down. As a member of the boom crew he lifted chains weighing 80 pounds. As a person working on yard duties he was lifting 8 foot logs. Moreover, he seemed to be able to complete his work assignments on the truck driver job and the boom crew job. He testified he was moved to other jobs not because of his neck condition but because there was no more work to do.

The worker's ability to perform what we would consider to be reasonably heavy assignments for a period of some four months following a preceding period of approximately a year and a quarter in which there is an absence of neck complaints leads us to conclude that the worker's neck condition as of May 15, 1981, cannot reasonably be related to his November, 1978, accident. We think it is more likely the case that the worker's neck improved during the fourteen months that he was off work because of his knee disability. Proof of the improvement is the worker's ability to perform his assignments in the first four months of 1981.

Nor are we satisfied that the worker's lay off on May 15, 1981, was caused by the work he performed in the previous four months. The worker did not describe a

specific incident which gave rise to the onset of pain. Rather, he described the neck pain as something that gradually increased, beginning in November, 1978, and continued to increase up to the present time.

To establish entitlement, a worker must show that the disability resulted from a personal injury by accident arising out of and in the course of employment. One of the definitions of accident is:

"Disablement arising out of and in the course of employment."

See section 1(1)(a)(iii) of the Workers' Compensation Act.

To establish a disablement arising out of and in the course of employment, we are of the view that there must be something about the nature of the work being performed which caused the disablement to come on.

In this case, the worker has described three different jobs over a four month period which he was able to do and at no time did he describe a sudden onset of pain or was he able to relate anything about the job that would suddenly render him totally disabled. Indeed, in the month preceding his visit to Dr. Hay, he was able to lift 80 pound chains and wrap them around wooden booms. When he went to see Dr. Hay, the doctor felt he could return to work in a few days. Although he did not agree with Dr. Hay and set up another appointment with Dr. Remus, he was still able to continue performing what would appear to be a fairly heavy yard job, not withstanding his disagreement with Dr. Hay's diagnosis as to his neck condition.

In our view, the circumstances surrounding the worker's lay off on May 15, 1981, do not support a finding of disablement arising out of and in the course of employment. Up to and including May 14, 1981, the worker was capable of heavy duties. No specific incident was described on May 14, 1981, yet, the worker stopped working on May 15, 1981, and has not returned to work since that day. Whatever may account for the worker's inability to return to work from and after May 15, 1981, this Panel is satisfied that neither his November, 1978, accident nor the nature of his work are the causes.

DECISION

The appeal is denied.

DATED at Toronto, this 16th day of June, 1986.

SIGNED: J. Thomas, B. Cook, D. Jago.



Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

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DECISION NO. 233

Panel Chairman: R.E. Hartman

Member: J. Ronson

Member: L. Heard

June 1986

RESEARCH AND PUBLICATIONS DEPARTMENT

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

INTERIM DECISION NO. 233

THE APPEAL PROCEDURE

This is an appeal by the worker of a decision of S. Rudderham, Appeals Adjudicator, dated January 17, 1986, in which the worker's pension for a low back disability was increased from 15% to 20%. It was the worker's contention that the disability was greater than 20%.

A hearing was convened on May 7, 1986, before a Panel of the Appeals Tribunal consisting of R.E. Hartman, Panel Chairman, J. Ronson, a member of the Tribunal representative of employers, and L. Heard, a member of the Tribunal representative of employees.

The worker was present and wished to represent himself. The employer was represented by J. Lees, Chief Safety Coordinator. D. McDonald, Safety Coordinator, attended as an observer on behalf of the employer.

This worker's appeal is one of several appeals presently before the Tribunal involving WCB pension assessments and decisions under section 43 of the Workers' Compensation Act. As a rule, these cases are being held in abeyance, pending the outcome of the Tribunal's leading case scheduled to be heard by a special Hearing Panel in June, 1986. This worker had requested that an exception be made in his case, allowing him to present his evidence before a Hearing Panel prior to his return to his native Newfoundland in 2 weeks. Accordingly, this hearing was scheduled.

At the commencement of the hearing, the worker clarified that the reason he wished to present his case now was to avoid the expense of returning from Newfoundland to Ontario for a hearing subsequent to the outcome of the Tribunal's Leading Case.

The Panel expressed its concern that even if it were to proceed to receive evidence the worker might well be required to attend at a reconvened hearing subsequent to the Leading Case decision, either to make submissions or give further evidence to assist the Panel in reaching a determination on points raised by the decision of the Tribunal in the Leading Case.

The Panel invited comments from both the worker and the employer's representative. The employer's representative had no objections to an adjournment and the worker's only objection was with respect to costs of re-attending.

It was the view of the Panel that the parties would be at a distinct disadvantage in presenting evidence at this time given that neither the parties nor the Panel members were in a position to know the Tribunal's approach to section 43 and WCB Policy and interpretation. It appeared likely that subsequent to a decision in the Leading Case, the hearing would have to be reconvened to receive further evidence on material points. In these circumstances, the Panel weighed the appropriateness of having two hearings against deferring a hearing on the merits to a point in time when all parties to the hearing had full knowledge and benefit of the decision in the Leading Case. It concluded that the latter procedure was preferable.

INTERIM RULING

The hearing is to be rescheduled subsequent to a decision in the Leading Case. The Panel directs the Tribunal Counsel Office to forward to the worker, at his address in Newfoundland, the final decision in the Leading Case as soon as it is rendered, with a hearing on the merits to be scheduled in the usual manner. The worker is to keep the Tribunal advised of an up-to-date address and telephone number. The Panel directs that reasonable travelling and living expenses incurred by the worker solely as a result of his attendance at such subsequent hearing are to be allowed at the discretion of the Tribunal.

DATED at Toronto this 25th day of June, 1986.

SIGNED: R.E. Hartman, J. Ronson, L. Heard.



Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

CAZON
L95
- D21

DECISION NO. 241

Panel Chairman: R. Hartman

Member: L. Heard

Member: J. Ronson



June 1986

RESEARCH AND PUBLICATIONS DEPARTMENT

Workers' Compensation Appeals Tribunal

505 University Avenue, 7th Floor, Toronto, Ontario M5G 1X4
(416) 598-4638

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 241

THE APPEAL PROCEDURE

This is an appeal by the worker of a decision of V.W. Ferguson, Appeals Adjudicator, dated August 22, 1985, denying the worker entitlement to compensation arising out of an alleged accident in July of 1982.

The appeal was heard on May 12, 1986, by a Panel of the Appeals Tribunal consisting of R. Hartman, Panel Chairman, L. Heard, a member of the Tribunal representative of workers, and J. Ronson, a member of the Tribunal representative of employers.

The worker appeared and wished to represent himself. The employer, a hospital, was represented by its Assistant Executive Director of Human Resources, D. Shaw. The Case Description Materials were prepared by G. Dee of the Tribunal Counsel Office who also assisted in pre-hearing discussions.

The Panel read and considered the relevant forms, memoranda and reports extracted from the WCB file and contained in the Case Description. The Panel also considered the transcript of the hearing before the Appeals Adjudicator.

The worker gave oral testimony under oath and was questioned by members of the Panel. Submissions were made by the worker and Mr. Shaw.

THE ISSUE AND HOW IT ARISES

The worker at the time of the hearing was 27 years old and was employed as a porter/cleaner. He advised the Panel that on July 14, 1982, while so employed with the employer hospital, he was in the process of cleaning a room at the hospital known as the swill room. This room holds hospital waste until it is picked up and taken away. Waste food is stored in refrigerators and waste from laboratories and other parts of the hospital is stored in bins or in cardboard boxes. Examples of such waste include specimens provided for laboratory testing, used needles, medication containers, etc.

The worker stated on this particular day he had been in the swill room just briefly when he was bitten on his right forearm by an insect he identified as a fly. The bite itself caused him momentary pain and he was immediately concerned that the fly might be a source of contamination given the room he was working in. He stated that he did not advise his direct supervisor at that time as she was on break. Instead, he went to the hospital's health nurse and reported the incident and sought medical attention.

The hospital health nurse testified before the Appeals Adjudicator that she has no recollection of such a reported incident and that there is nothing in the hospital's record to indicate he sought medical attention as alleged. It was her testimony that she did not hear any report regarding a fly bite until January of 1984, when it was mentioned to her by the worker after he received treatment from her for an unrelated matter.

The worker testified that after seeing the hospital's health nurse, in July of 1982, he felt reassured and took no further action with respect to the bite even though a rash about two inches in diameter erupted around the area, about a week after the incident. He sought no medical attention for this rash which disappeared shortly thereafter. He stated that a month or two after the July incident, his skin would develop welts on occasion. For a period of five days in the beginning of October, 1982, he did not go to work because, he stated, he was embarrassed about his appearance with the welts and concerned that co-workers would make comments. He did not seek medical attention with respect to these welts and the lay off from work was not as a result of a doctor's direction.

In November, 1982, he had a car accident resulting in 6 weeks lost time. He was treated by his family doctor as a result of this accident, with medication for pain in his neck and shoulders.

According to the WCB file, the worker's family doctor, Dr. Castrodale, reported to the WCB investigator that he had no record regarding a fly bite but did recall "from memory that one day in spring of 83" the worker was seen by him for other problems and mentioned that he had been bitten by a fly. The worker confirmed for the Panel that he did not mention the fly bite to his family doctor until sometime in 1983. No medical attention was sought for the skin problems until late in 1983, when Dr. Castrodale referred the worker to Dr. Shapero, dermatologist.

At the hearing, the worker said that he had had rheumatic fever as a child and that this meant he would be treated with antibiotics prior to any dental appointment to ensure that there was no risk of infection. He emphasized that the hospital nurse should have known this and should have treated him differently in July of 1982. He said he doesn't recall whether he advised the dermatologist of his childhood illness.

In a letter to the worker's family doctor, dated February 12, 1984, Dr. Shapero reported as follows:

"Examination reveals a healthy appearing male with no active eruption on his face, chest, back, arms or oral mucous membranes. He does, however, show marked dermographism, on stroking the skin of his back.

IMPRESSION: Severe dermographism. This is of course a form of urticaria where lesions are induced by scratching or rubbing the skin as opposed to the spontaneous type of urticaria we usually see. It usually occurs as an idiopathic condition, but occasionally develops in association with a photo or related allergy.

THERAPY: 1) At this time, I simply discussed a number of measures to reduce his dermographic response, including avoiding very tight clothing, avoidance of aggressive towelling, etc., and placed him on Atarax 25 mg. q.h.s. for 3 weeks, with a follow-up visit at that time."

The worker was seen again by Dr. Shapero in June of 1984, and he reported on June 11th that the "dermographism seems to be controlled on antihistamines, but flares when (the worker) stops them." He added:

"He states that he thinks things started when he was bitten by a fly in an area where he works where medicinal wastes are disposed of. I otherwise reassured him, and suggested that he continue the use of antihistamines in minimal dosage, perhaps one every two or three nights as necessary. In most individuals, dermographism eventually recedes spontaneously although it can last for months or years."

In a further letter, addressed to the worker's representative at that time, dated July 27, 1984, Dr. Shapero reported:

"(The worker) has dermographism, which is a form of hives (urticaria). This can be caused by a number of agents or may occur spontaneously. Possible causative agents include foods, drugs, systemic illnesses and infectious processes. Hives can certainly also occur following insect bites, most commonly bees, wasps, hornets, etc. When dermographism or hives develop following allergic process, the effect can go on for many months or even years in some individuals despite the absence of further exposure to the triggering agent.

CONCLUSION: This man has a form of hives, which can conceivably be related to induction by a biting insect. He states that he was bitten by an insect as noted above, with an active local reaction at the time, although this was of course eighteen months prior to my seeing him initially. It is, therefore, certainly conceivable that this may have been a cause of his dermographism, although this can not really be stated with certainty. There is probably about a 50% chance that the problem will sort itself out over the next year or two. Many people, however, do have hives persist for several years, as is the case here, and may continue to develop hives and dermographism at intervals for many years."

It is the worker's contention that the cause of his lay off of 5 days in October of 1982, was a direct result of the hives he feels were caused by the fly bite on July 14, 1982. The sole issue then is whether entitlement to compensation under the Act has been established.

THE PANEL'S REASONING

The Panel has reviewed the evidence of the worker given at the hearing together with the transcript of evidence given at the hearing before the Appeals Adjudicator, and the medical reports and WCB memos and correspondence contained in Exhibit #1. The Panel notes that the worker's claim for compensation was initiated by a letter from him received by the Board in July of 1984, in which he relates the events of July of 1982. There is no WCB form report of injury or accident by either employee or employer. The original WCB file was lost and a new file reconstructed. It was not contended these formed part of the original file.

According to the worker's own testimony, there was no immediate lay off from work and his claim is solely for five days lost time in October of 1982. There is no medical evidence regarding the cause of this lay off as no medical attention was sought until late 1983. We were advised by the employer that the worker's absence was noted in its records as being "with permission not sick" for the first two days and the last three were noted in its record as the worker having called in ill. According to the worker, he went to work on the first morning of that five-day period and as he was unpacking boxes he looked at his arms and asked to go home. He said he stayed away because he did not wish to be seen.

Although the worker described the symptoms as arising immediately, i.e. a red dot at the site of the bite with a small red rash occurring about a week later, he confirmed no medical attention was sought beyond attendance at the office of the hospital's health nurse. He said he felt this was sufficient to reassure him. Although Dr. Castrodale was his family doctor at that time and subsequently, he did not mention the incident to his family doctor until 1983 and no medical attention was sought specifically for the hives until late 1983 when he was referred to Dr. Shapero. He saw Dr. Shapero 2 or 3 times and took antihistamines whenever the eruptions occurred. He stated that all symptoms ceased by December of 1984, and he has been symptom-free since that time.

The Panel notes that the only evidence suggesting an incident at work on July 14, 1982, is that given by the worker to the Board for the first time in a letter received in July of 1984. The letter is undated but the worker confirmed it would have been sent by him in or around July, 1984. The worker's recollection of a direct report to the hospital health nurse is not substantiated by the recollection of the health nurse as recounted by her to the Appeals Adjudicator. The worker states that he did not report the matter to his actual supervisor at that time as she was on coffee break and he did not wish to disturb her. According to the evidence, other than that of the worker's, no report of an incident involving a fly bite is made until spring of 1983, when Dr. Castrodale recalls the worker mentioning a fly bite. No active treatment is sought from Dr. Castrodale until much later in 1983 when the worker is referred to a dermatologist. The first report noted on record to the employer is made in January of 1984, when according to the health nurse, the worker attended at her office with respect to other complaints and then, after being treated, came back and started to describe the incident involving the fly.

The medical evidence on file records a diagnosis of a skin condition commonly known as hives and Dr. Shapero speculates generally as to possible causes. Dr. Shapero does not express the opinion that the worker's skin condition and the reported fly bite are causally related in any way. At best, he states generally that it is conceivably related. In Dr. Castrodale's first report to the WCB, on July 4, 1984, he reports that the worker "became increasingly concerned over the dermatographism in Nov/Dec/83 Jan/84 (and) was referred for a dermatology consult with Dr. Shapero Feb 12, 1984."

In order for there to be entitlement to compensation, the Panel must be able to conclude, on a balance of probabilities that a personal injury by accident occurred which arose out of and in the course of the worker's employment. No argument was raised that this was an industrial disease under section 122 of the Act and the medical evidence does not disclose dermatitis venenata, a skin condition caused by poison ivy, resins or chemical reactions, recognized under Schedule 3 of the

regulations passed pursuant to the Act and section 122 entitlement for industrial disease. Thus the provision the Panel must consider is section 3 which entitles an employee to compensation where a compensable personal injury disables him/her beyond the date of the accident.

On July 14, 1982, the worker alleged an accident occurred which disabled him from working for five days in October, 1982.

The Panel notes:

1. There is no independent or circumstantial corroboration of the worker's alleged accident on July 14, 1982. Even if the worker's testimony were to be accepted on its face, there was no evidence given by him to suggest he was in any way disabled by it, physically or psychologically, other than that he preferred not to be seen during one specific period in October, 1982.
2. As to whether the fly bite described by the worker could trigger hives some months later, the medical evidence does not address the chronology of the worker's symptoms in any detail and in weighing the possible causes cited by the dermatologist, it appears that other factors may be a more probable cause of the hives alleged in October, 1982.

On the information before this Panel, we are unable to conclude that there was an accident as defined in the Workers' Compensation Act resulting in personal injury and compensation pursuant to section 3(1) of the Act, or that any compensable disability resulted under section 39 or section 41 of the Act.

DECISION

The appeal is denied.

DATED at Toronto this 25th day of June, 1986

SIGNED: R. Hartman, L. Heard, J. Ronson.



Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

INTERIM DECISION NO. 255

Panel Chairman: R. Hartman

Member: D. Mason

Member: A. MacIsaac



June 1986

RESEARCH AND PUBLICATIONS DEPARTMENT

Workers' Compensation Appeals Tribunal

505 University Avenue, 7th Floor, Toronto, Ontario M5G 1X4
(416) 598-4638

WORKERS' COMPENSATION APPEALS TRIBUNAL

INTERIM DECISION NO. 255

THE APPEAL PROCEDURE

The employer appeals the February 8, 1985, decision of the Appeals Adjudicator, S. Rudderham. This decision granted the worker entitlement to temporary total disability benefits from November 28, 1983, to July 3, 1984, as a result of an accident on November 25, 1983.

This matter came on for a hearing on May 15, 1986, before a Panel of the Appeals Tribunal consisting of R. Hartman, Panel Chairman, D. Mason, a Tribunal member representative of employers, and A. MacIsaac, a Tribunal member representative of workers.

The employer was present in the person of its President, M. Barriage. The worker and his representative, G. Nolis, of the WCB Office of the Workers Adviser were also present. M. Faubert appeared on behalf of the Tribunal Counsel Office.

THE ISSUE AND HOW IT ARISES

The President of the employer, Mr. Barriage, requested an adjournment at the commencement of the hearing. He confirmed that he had launched the appeal on March 6, 1985, and had received the Notice of Hearing from the Tribunal Counsel Office, dated February 24, 1986. The Panel was advised that Mr. Barriage had requested a copy of the WCB file from the Tribunal Counsel Office and that this was forwarded to him on March 26, 1986. Mr. Barriage stated that he never received this file and that it was not until April 18, 1986, that he received the Case Description Materials prepared by the Tribunal Counsel Office.

The Panel was advised by Ms. Faubert that the employer had contacted her on May 13 stating that he wished to adjourn the hearing until he had someone to represent him. The employer confirmed this and stated that he contacted the Office of the Employer Adviser about a week prior to the hearing and was advised that no representative was available for the hearing date on such short notice.

The worker's representative objected to the granting of an adjournment on the grounds that the worker would be economically prejudiced should it be granted. He advised that the worker was presently employed on eleven hour shifts earning \$18.00 per hour. As the witness fee is only \$64.00, the worker was required to absorb a substantial economic loss. He noted that the employer did not attend at the prior hearing before the Appeals Adjudicator. Further the Tribunal hearing was initiated by the employer and he had had more than adequate time subsequently to obtain the services of a lawyer.

The Tribunal Counsel Office directed the attention of the Panel and the parties to Decision No. 15, being a decision of a separate Panel dealing with the criteria for granting requests for adjournment. The Panel was advised that the criteria set out therein reflected current Tribunal policy.

The guidelines established for the Tribunal in considering requests for adjournment are as follows:

1. Generally, the Tribunal will not grant adjournments where parties have had adequate notice of the hearing date. The Tribunal considers six weeks notice to be adequate.
2. The hearing date will be set by the Tribunal and will not necessarily be set on consent.
3. Adjournment requests are to be made in writing, prior to the hearing date, with copies of the written reasons for requesting the adjournment provided to the client and to the other party.
4. The request and any response by other parties will be considered by a Panel of the Tribunal.
5. The test applied by the Tribunal will be one of granting adjournments only in exceptional circumstances. Generally, the representative's convenience and timetable conflicts will not be considered as an exceptional circumstance.
6. In cases where less than six weeks notice of hearing is given, alternative hearing dates will usually be arranged where either of the parties finds it impossible to attend on the scheduled date.

The issue is whether or not the employer appellant's request for an adjournment should be granted.

THE PANEL'S REASONING

The Panel notes that the employer had over a year after requesting the appeal to arrange his affairs and obtain the services of a representative. The Panel also notes that the employer had more than six weeks notice of the hearing date. However, the employer states he never received a copy of the WCB file. He states that he only decided he needed a lawyer after receiving the Case Description and reviewing it subsequent to April 18, 1986. The Panel notes that the employer was not advised of the Tribunal's guidelines for adjournments at any point and that the decision establishing the guidelines is dated April 22, 1986.

Because of the particular nature of the worker's employment the Panel considered the inconvenience and financial consequences of granting the adjournment. It was of concern to the Panel that the employer had not taken prior steps to arrange his affairs, obtain the necessary documentation and conduct the necessary reviews to assist him in deciding whether or not he was prepared to attend on his own or should seek a representative.

The Panel reviewed the oral submissions for and against an adjournment, keeping in mind the Tribunal's policy and the principal of fairness. It was important that any Panel hearing the merits of the case have as full and complete a hearing on the evidence as possible. Given that this particular employer would be proceeding without having received the full WCB file, and, more importantly, that he did not

have prior notice of the adjournment requirements to be met, as set out in Decision No. 15, it was felt that the requirement for a fair and full hearing outweighed the inconvenience to both the worker respondent and the Tribunal in granting an adjournment.

It is expected that the circumstances in this case will not be repeated in the future as parties will have had notice of the Tribunal's adjournment policy.

DECISION

The request for an adjournment is granted. A subsequent hearing will be scheduled by the Tribunal Counsel Office and both parties will be expected to proceed at that time without further delay.

DATED at Toronto this 25th day of June, 1986.

SIGNED: R. Hartman, D. Mason, A. MacIsaac

Workers' Compensation Appeals Tribunal

DECISION NO. 264

Tribunal d'appel des accidents du travail

Panel Chairman: L. Bradbury

Member: B. Cook

Member: R. Apsey



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

June 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 264

THE APPEAL PROCEDURE

This is an application by the employer for leave to appeal a decision of the WCB Appeal Board dated April 23, 1985.

The application is brought under section 86o(3) of the Act which states that leave to appeal a decision of the Appeal Board shall not be granted unless:

- (a) there is substantial new evidence which was unavailable at the time of the hearing by the panel; or
- (b) there appears to the Appeals Tribunal to be good reason to doubt the correctness of the decision.

The employer's application was brought under section 86o(3)(b).

The application was heard on May 20, 1986, by a Panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, B. Cook, a member of the Tribunal representative of workers, and R. Apsey, a member of the Tribunal representative of employers. The employer was represented by F.R. Simioni, Safety Co-ordinator for the employer company. The worker appeared and was represented by D. Craig from Halton Hills Community Legal Clinic.

The Panel had before it the decision in question, together with materials from the WCB file. In accordance with its practice, the Panel heard the leave application only.

THE ISSUE AND HOW IT ARISES

The background of the leave application, briefly, is that the worker was granted entitlement by the Appeal Board for his back disability after January, 1983, on the ground that his disability was related to his work accident on April 5, 1982.

Following the WCB Appeal Board hearing and prior to rendering a decision, the Board obtained a further medical report from an outside orthopaedic consultant, Dr. W.R. Harris. The doctor examined the worker, reviewed the medical documents in the file and concluded that "it is probable that the disability that recurred on January 1983, was related to his original accident".

The crux of the employer's argument in the application before this Panel was that Dr. Harris had not received all the medical information in the file and, therefore, his opinion should not have been relied on by the Appeal Board.

Following receipt of the Appeal Board's decision in April, 1985, the employer contacted Dr. A. Geisler, a specialist in family and occupational medicine, and requested his medical opinion. Dr. Geisler did not examine the worker and based his opinion on a review of some of the medical documents in the worker's file. Dr. Geisler was called as a witness for the employer at the leave hearing and basically repeated the opinion set out in his report dated September 30, 1985.

The issue for this Panel is whether Dr. Geisler's opinion constitutes "good reason to doubt the correctness of the Appeal Board's April 25, 1985 decision".

THE PANEL'S REASONING

The worker's representative, Mr. Craig, objected to Dr. Geisler's evidence on the basis that the Tribunal must consider whether there is good reason to doubt the correctness of the decision in light of the evidence that was before the Appeal Board at the time it made its decision.

However, the Panel finds that in some cases, the provisions of section 86o(3)(a) and (b) will be considered together. For example, if there are a number of errors of law or fact in the Appeal Board decision itself but they are not sufficient in themselves to give "good reason" to doubt the correctness of the decision, the introduction of new evidence which is not really substantial may "tip the balance"; that is, the new evidence plus the technical errors in the decision may be sufficient, when considered together, to conclude that there is good reason to doubt the correctness of the decision.

In this case Dr. Geisler reviewed some of the medical reports on the worker's file and simply comments on those reports without providing a thorough analysis of the reports. He did not examine the worker as did the other specialists whose reports are before this Panel and whose reports were before the Appeal Board. For these reasons, it does not appear to this Panel that Dr. Geisler's opinion provides good reason to doubt the correctness of the Appeal Board decision. It appears to this Panel that had Dr. Geisler's letter been before the Appeal Board, it would not have been of sufficient weight for the Board to prefer it to the reports of the two other specialists whose reports were on the worker's file.

On the question of whether Dr. Harris had all the evidence before him when preparing his opinion for the WCB Appeal Board, the Panel notes the Board's letter to Dr. Harris, dated August 30, 1984, which states:

"I am enclosing all the medical reports on file".

Thus, the Appeal Board did not err in relying on Dr. Harris' report in coming to its decision.

The Panel concludes that the employer's application under section 86o(3)(b) does not meet the test set out in that section.

The Panel also finds that, even if the application had been brought under section 86o(3)(a) of the Act, the employer's application must fail. That section requires "substantial new evidence which was unavailable" at the time of the Appeal Board Hearing.

In the case before us, Dr. Geisler's report is "new" evidence. However, we have already concluded that it was not "substantial" when it is considered in conjunction with the reports of the other specialists on file. In addition, it appears to this Panel that Dr. Geisler's report could have been made available to the Appeal Board had the employer chosen to contact Dr. Geisler at an earlier date. In fact, the Appeal Board requested a report from Dr. Harris after its hearing. Dr. Harris' report was then circulated to the parties who were given an

opportunity to provide the Appeal Board with further submissions. The employer did not contact Dr. Geisler at that time but waited until several months after it had received the Appeal Board's decision. In the circumstances, the Panel finds that the report could have been provided to the Appeal Board prior to it's decision. Thus, the test under section 86o(3)(a) has not been met.

DECISION

The application for leave to appeal the decision of the WCB Appeal Board is denied.

DATED at Toronto this 10th day of June, 1986.

SIGNED: L. Bradbury, R. Apsey, B. Cook.

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Workers' Compensation Appeals Tribunal

INTERIM DECISION NO. 273

Tribunal d'appel des accidents du travail

Panel Chairman: I.J. Strachan

Member: J. Heard

Member: D. Jago



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

June 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

INTERIM DECISION NO. 273

THE APPEAL PROCEDURE

This is an appeal from the decision of the Workers' Compensation Board Appeals Adjudicator, J.I. Daley, dated May 17, 1983, denying the worker's entitlement to benefits from August 14, 1981, to present based upon the accident of August 29, 1977.

The appeal was heard in Sudbury on April 22, 1986, by a Panel consisting of I.J. Strachan, Panel Chairman, L. Heard, a member of the Tribunal representative of workers, and D. Jago, a member of the Tribunal representative of employers (the "Panel").

The worker attended and was represented by H. Conroy of the Office of the Worker Adviser in Sudbury. The employer was represented by J. Ryan, Barrister and Solicitor.

PRELIMINARY ISSUE

Both counsel for the worker and counsel for the employer made submissions with respect to a request for an adjournment. The major basis for requesting the adjournment was the existence of a 1967 WCB claim file respecting the worker's claim for benefits based on the back disability, while he was employed by another employer. In addition, the worker's representative raised certain problems with respect to conflicting medical evidence.

After discussion and deliberation, the Panel concluded that it would be unfair to the parties to proceed with the hearing. The parties must be given full opportunity to present their respective cases in order that the Tribunal decision reflect the real merits and justice of the case. In this particular case, the material on the 1967 WCB file might well affect the liability of the employer and might also contain medical evidence advantageous to the worker.

The Tribunal concluded that the principle of fairness was paramount and granted the adjournment.

DATED at Sudbury this 9th day of June, 1986.

SIGNED: I.J. Strachan, L. Heard, D. Jago.

Workers' Compensation Appeals Tribunal

DECISION NO. 276

Tribunal d'appel des accidents du travail

Panel Chairman: A. Signoroni

Member: F. Lankin

Member: R. Apsey



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

June 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 276

Appeal to the Appeals Tribunal heard on May 22, 1986, by:

A. Signoroni: Panel Chairman
F. Lankin: Member of the Tribunal representative of workers
R. Apsey: Member of the Tribunal representative of employers.

THE APPEAL PROCEEDINGS

The worker appeals the May 31, 1985, decision of the WCB Appeals Adjudicator, M.C. Turner. The worker appeared and was represented by M. Panicali, his lawyer. The employer was advised of the hearing but chose not to attend. Tribunal counsel J. Siegel appeared on behalf of the Tribunal. The worker was assisted by an Italian interpreter. The Panel read the Case Description recital of facts prepared by Tribunal counsel and agreed to by the worker, as well as the attached documents. Submissions were made by Mr. Panicali and Mr. Siegel.

THE NATURE OF THE CASE

This case involves a disagreement as to whether the worker recovered from a disability or continued to be partially or totally disabled.

THE EVIDENCE

Relevant WCB file documents selected by Tribunal counsel, approved by the participating parties and attached to the Case Description. Oral evidence under oath by the worker.

THE PANEL'S REASONS

The worker is 54 years old. On July 20, 1983, while cleaning metal moulds weighing approximately 25 pounds each, he injured his torso as he attempted to stop one of these moulds from slipping off a conveyor belt and suffered a lumbosacral strain.

Initially, the WCB took the position that there was no proof of a work accident. However, the claim was subsequently allowed at the Appeals Adjudicator level and temporary total benefits were paid.

On July 27, 1984, Claims Adjudication terminated the payment of temporary total benefits on the opinion of Dr. F. Langer who examined the worker and found that he could return to work immediately. This decision was upheld by the Claims Review Branch and the Appeals Adjudicator.

There is no issue that the worker suffered a compensable accident. The only issue in this appeal is whether as of July 27, 1984, the worker continued to be either totally or partially disabled as a result of his compensable accident of July 20, 1983.

The medical evidence before the Panel regarding the issue as stated is not consistent. On one hand, there are the opinions of Dr. Langer, and Dr. MacFarlane, a WCB surgical consultant, who were of the view that the worker had recovered from the compensable disability.

On the other hand, the opinions submitted by Dr. L.F. Moro, the family physician, and the other orthopaedic specialists that examined the worker support a different view.

Orthopaedic specialist, Dr. W.J. Virgin, on October 18, 1984, was of the opinion that the worker "is ready to be rehabilitated with a view of getting back to his regular job".

Orthopaedic specialist, Dr. M.D. Charendoff, on April 1, 1985, noted that the "lumbar spine movements were restricted to 80% of normal with discomfort".

Subsequent to the Appeals Adjudicator Hearing, additional medical evidence was generated. On July 24, 1985, the worker was seen by orthopaedic specialist, Dr. G. Maistrelli. In his report, he noted that the worker appears to have a very mild form of degenerative disc disease. He further commented that the worker must avoid activities that involve heavy lifting and bending. In his view, however, the worker appeared fit for modified or light work.

Upon a complete review of the WCB file, orthopaedic specialist, Dr. M.D. Charendoff, in his report of June 24, 1985, indicated that the worker "is probably partially unable to carry out all of the duties of his occupation."

During the course of his testimony, the worker stated that in December, 1984, he was involved in a motor vehicle collision and suffered a mild injury to his neck. In this regard, the worker further testified that for the next six months he had some pain in his neck, however, it was his back that was rendering him continually disabled.

The worker confirmed that he may be able to do some light work, however, he said that he is not certain as to what specifically and therefore he confirmed not having made any attempt to find light or modified work.

On the evidence, we are of the view that the worker continued to be partially disabled after July 27, 1984. The Panel is also of the view that sometime during the period from July, 1984, to the day of the hearing, the compensable disability has reached a stable level. For this reason, the worker should be assessed for a permanent disability award. In addition, the worker should be referred to the H.&R.C. so as to be assisted in his rehabilitation efforts.

THE DECISION

The worker is found to have been partially disabled by reason of the compensable accident of July 20, 1983, from July 27, 1984, to the day of the hearing and subsequently as may be determined by the WCB.

The determination of the nature of the compensation entitlement and its quantum in respect of the period from July 27, 1984, onward is left to be determined by the Worker's Compensation Board in light of the findings and the recommendations made by this Panel.

DATED at Toronto this 17th day of June, 1986.

SIGNED: A. Signoroni, F. Lankin, R. Apsey.



Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

DECISION NO. 287

Panel Chairman: A. Signoroni

Member: D. Mason

Member: N. McCombie

June 1986

RESEARCH AND PUBLICATIONS DEPARTMENT

Workers' Compensation Appeals Tribunal

505 University Avenue, 7th Floor, Toronto, Ontario M5G 1X4
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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 287

Appeal to the Appeals Tribunal heard May 26, 1986, by:

A. Signoroni: Panel Chairman
D. Mason : A member of the Tribunal representative of employers.
N. McCombie : A member of the Tribunal representative of workers.

THE APPEAL PROCEEDINGS

The worker appeals the August 21, 1985, decision of the Appeals Adjudicator, T.D. Allamby.

The worker appeared and was represented by L. Schultz, a member of the Teamsters' Union, Local 879. The employer was advised of the hearing but chose not to attend. The Tribunal was assisted by A. Worland, in the role of Tribunal counsel.

THE EVIDENCE

The Panel heard and considered oral evidence under oath by the worker. The Panel read the Case Description recital of facts prepared by Tribunal counsel and agreed to by the worker, as well as the attached documents and received at the hearing other documentary evidence presented by the worker. Submissions were made by the worker's representative and Tribunal counsel.

THE NATURE OF THE CASE

The issues in this appeal are as follows:

1. the amalgamat9???i????arious WCB claims for low back disability under one claim number;
2. entitlement for various non-work related onsets of low back pain;
3. entitlement for a further problem involving the low back, arising while at work on July 23, 1984; and,
4. entitlement for health care costs arising from these incidents.

THE PANEL'S REASONING

It would appear to the Panel that the Board, in the management of this worker's claim(s), initially took the decision to treat the series of incidents of low back disability as extensions of the initial claim of October 1, 1977. So, the same claim number was used for the subsequent incidents of March 13, 1978 and September 14, 1979.

On June 12, 1980, the worker had a further onset of low back pain at work, a claim was submitted and a new claim number established. After investigation, however, the WCB medical advisor wrote that the worker had been "treated on several occasions in 78 and 79 for similar complaints", and in memo #15 the new claim number was asked to be amalgamated with the old one. A small administrative problem then developed, in that payments had already been made under the new claim number. As a result, it appears that the decision to amalgamate these claims never occurred.

From that point on, all further incidents were then treated as new injuries, with new claim numbers established for the further incidents of February 9, 1981, and May 18, 1982. All these incidents were ruled by the WCB as compensable accidents. On each occasion the worker was absent from work not more than a few days.

There was also a reported incident of November 29, 1982. However the Panel can find no reference to any claim number for that incident, despite the employer's Form 7 - Report of Accident - on file.

The Panel notes that both the worker and the employer protested, at the time, that these new claims should be considered as recurrences of the original accident.

Following these compensable incidents, the worker had three onsets of low back pain while off the job. There was no lost time for these non-occupational incidents. The WCB found they were not compensable and thus chiropractic treatment was denied.

Finally, there was another incident at work on July 23, 1984. This was denied by the Board on the grounds that it was neither an aggravation of the October, 1977 incident nor a compensable accident within the meaning of the Act. In this instance the worker was disabled for three days.

It is not clear to the Panel why the Board reversed its original decision to treat the subsequent incidents as recurrences of the initial injury. In a memo dated February 29, 1980, referring to the September, 1979 incident, Dr. H.B. Jackson, the WCB surgical consultant, states that "this man does have a vulnerable back in view of his spondylolysis" and that "Despite the lack of continuity it would be my opinion that with the benefit of doubt one could relate this man's September problems to his 1977 compensable injury ..."

The Panel found the worker to be a credible witness and therefore has no reason to doubt his testimony that he had suffered no similar low back problems prior to 1977. The worker admitted that in 1964 and in 1982 he was involved in motor vehicle collisions, however, they did not cause problems to his lower back.

Even though there is some evidence that the worker had a slipped disc when he was X-rayed on October 3, 1977, this condition was not symptomatic prior to the October 1, 1977, accident.

Furthermore, given the additional continuity of complaint reported by way of the WCB Investigator's interview with the employer and the similarity of onset, complaint and duration of the subsequent incidents, the Panel accepts Dr. Jackson's initial opinion as just as valid for the later incidents.

That being the case, we are of the view that the worker's various incidents from 1977 to 1984 are related and should properly be seen as arising from the initial injury of October 1, 1977.

The Panel accepts the view that the low back condition made symptomatic by the October 1, 1977, accident never resolved itself, and remained the significant cause of the non-work related incidents suffered on July 17, 1983, January 1, 1984, and March 29, 1984. In other words, but for the initial accident in 1977 and the subsequent work related occurrences from 1978 to 1982, the worker would have not suffered the problems experienced in 1983 and 1984.

The Panel also notes that in a memo dated October 4, 1984, it was suggested by the Claims Adjudicator that the worker should be reviewed for a permanent disability assessment. This recommendation does not appear to have been followed up and, while that issue is not before the Tribunal, we feel that such an assessment would be worthwhile for all concerned.

THE DECISION

1. The appeal is allowed. The Panel finds that the various incidents of low back pain referred to in this decision result from the October 1, 1977, claim and should be treated as aggravations of that claim.
2. The worker's request for reimbursement of health care costs, related to Chiropractic treatment for recurrences of his low back condition, suffered on November 29, 1982, July 17, 1983, January 1, 1984, March 29, 1984, July 23, 1984, should be paid by the Board.
3. Regarding the July 23, 1984, recurrence, the worker was absent from work three days for which he is entitled to compensation benefits.

DATED at Toronto this 27th day of June, 1986.

SIGNED: A. Signoroni, N. McCombie, D. Mason.

